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No.

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DONALD E. BORDENKIRCHER, Superintendent Kentucky State Penitentiary - - Petitioner

versus

GEORGE H. CLEAVER - - - - - Respondent

Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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STEVEN L. BESHEAR
Attorney General

J. GERALD HENRY
Assisant Attorney General
Counsel of Record
Capitol Building
Frankfort, Kentucky 40601
Telephone: (502) 564-4044
Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

The petitioner prays that a writ of certiorari issue to review the appellate opinion and judgment of the United States Court of Appeals for the Sixth Circuit rendered October 31, 1980.

THE QUESTION PRESENTED FOR REVIEW

Is There a Constitutional Right to the Effective Assistance of Appellate Counsel, as Opposed to Trial Counsel?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are set forth in the caption of the case before this Court.

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No.

SUPREME COURT OF THE UNITED STATES

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DONALD E. BORDENKIRCHER, Superintendent
Kentucky State Penitentiary - - *Petitioner*

v.

GEORGE H. CLEAVER - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER, WITH APPENDIX

REFERENCE TO OPINIONS

Decision herein by the United States Court of Appeals for the Sixth Circuit was by opinion rendered and entered on October 31, 1980 in Cleaver v. Bordenkircher, —— F. 2d —— (6th Cir. 1980, No. 79-3514). This opinion may be found at Appendix 25-30. The order and memorandum opinion of the United States District Court for the Eastern District of Kentucky, reviewed on appeal to the Court of Appeals, were both dated May 29, 1979. The memorandum opinion was entered May 30, 1979, and the order was entered May 31, 1979, and both may be found at Appendix 31, 32-40.

STATEMENT OF JURISDICTION

The filing and entry date of the appellate opinion and judgment of the United States Court of Appeals for the Sixth Circuit of which review is sought in this Court is October 31, 1980. The appellate opinion and judgment resulted from a civil appeal from a habeas corpus proceeding in the District Court.

No rehearing was sought by any party.

Jurisdiction is conferred upon this Court to review by writ of certiorari the appellate opinion and judgment in question by 28 U.S.C. § 1254(1).

This Court should grant the writ of certiorari under the authority of Rules 17.1(a) and (c) of this Court.

Rule 17.1(a). The Sixth Circuit has decided a federal question in a way in conflict with the Supreme Court of Kentucky, a court of last resort, thereby casting doubt on the Kentucky court's Constitutional ability to dismiss Kentucky appeals based upon appellate counsel's procedural default. In so doing, the federal court of appeals has so departed from this Court's opinion authority regarding state-court appeals, and from its rule authority, and from its principles of comity and federalism as to call for this Court's supervision to resolve and restore its Constitutional authority.

Rule 17.1(c). The Sixth Circuit has decided a nationally important question involving state-court power over state-court appeals procedures, and as to whether there is a substantive Constitutional right to effective assistance of state-court appellate counsel, in a way in

direct conflict with *McKane* v. *Durston,* 153 U. S. 684 (1894), *Ross* v. *Moffitt,* 417 U. S. 600 (1974), and *Francis* v. *Henderson,* 425 U. S. 536 (1976), and the principles embodied in Rules 16.1 and 33.7 of this Court and Rule 31(c) of the Circuit Courts. That federal court of appeals cites no authority to justify its holding. This Court should settle such challenge to its authority and to the Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner asserts that there is no Constitutional authority to justify the result of the courts below. Such absence of authority involves reference to

The Sixth Amendment, Constitution of the United States

The Tenth Amendment, Constitution of the United States

The Fourteenth Amendment, Constitution of the United States

Rules 16.1 and 33.7, Supreme Court of the United States

Rule 31(c), Federal Rules af Appellate Procedure.

The full text of this authority is set forth at Appendix 42-45.

STATEMENT OF THE CASE

Reference herein will be to the record appendix on file in the Sixth Circuit (JA), and to the Appendix required to accompany this petition (A). Jurisdiction in the District Court was asserted under 28 U.S.C. § 2254 (JA 1; A 33).

Respondent George Herman Cleaver was found guilty in the Johnson (Ky.) Circuit Court of murder and robbery (JA 67). Judgment of conviction and sentence was imposed upon respondent in that court on February 5, 1976 (JA 67). Notice of Appeal to the Supreme Court of Kentucky was timely filed on February 5, 1976 (JA 20, 67).

The record on appeal was due no later than 120 days after February 5, 1976. However, respondent obtained three extensions of time so that the record was ultimately filed almost one year later on January 19, 1977 (JA 21). Respondent's appeal brief became due 40 days after January 19, 1977 (JA 22). Respondent moved for an extension of time in which to file his brief on the grounds that he had six briefs due in the period just before February 24, 1977 (JA 26). The Commonwealth of Kentucky did not object to respondent's motion and the Supreme Court of Kentucky granted the requested extension to March 30, 1977 (JA 29).

On March 30, 1977, respondent moved for an additional period of time in which to file his brief on the ground that he again had seven briefs due within ten days of March 30, 1977 (JA 30). On April 20, 1977, the Supreme Court of Kentucky denied the motion (JA 33).

On July 29, 1977, or three months after the brief was originally due, respondent moved for an extension of time to file his brief in which he recounted that he was unable to meet the March 30 deadline because he had seven other briefs to prepare, that he had since

prepared 23 subsequent briefs and that these facts constituted excusable neglect (JA 34-38).

The Commonwealth of Kentucky objected and moved to dismiss the appeal; the appeal was dismissed (JA 52, 54).

Respondent then returned to the Kentucky circuit court, which imposed another judgment upon him for the sole purpose of taking another appeal. On January 30, 1978, the Commonwealth of Kentucky moved to dismiss this second appeal (JA 75). The Supreme Court of Kentucky initially denied this motion (JA 89). However, that court on its own later reconsidered this denial and dismissed this second appeal (JA 90-95) in a case styled *Cleaver* v. *Commonwealth,* Ky., 569 S. W. 2d 166 (1978).

On October 13, 1978, respondent filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Kentucky in which he alleged he was denied the right of state-court appeal because of the ineffective assistance of his appellate counsel, in violation of the Fourteenth Amendment (JA 1-16).

Petitioner denied that respondent has a Constitutional right to the effective assistance of appellate counsel, as opposed to trial counsel, and that in the absence of invidious discrimination the dismissal of his Kentucky appeal did not violate the Fourteenth Amendment (JA 97-124).

On January 26, 1979, the District Court's magistrate, in his report and recommendation, agreed with respondent's argument (JA 125-127). Petitioner ob-

jected (JA 128-132). On May 29, 1979, the District Court issued a memorandum opinion finding against petitioner on the issues of (1) whether respondent had a Constitutional right to effective assistance of appellate counsel on state-court appeal, the District Court thinking such state appeal was "mandatory," and (2) if such right exists, whether it was violated by the failure of respondent's appointed counsel to timely file his brief on appeal, thereby causing dismissal of the appeal (A 31-40).

The District Court found on due process grounds that respondent had received ineffective assistance of his appellate counsel, and granted the writ of habeas corpus. That court pointedly noted that respondent had asserted no equal protection deprivation whatsoever in that court, and that he did not allege that the rules of dismissal were applied in a discriminatory way to deprive him of an appeal because of his indigency.

In reaching its due process decision, the District Court relied upon opinion authority of the United States Court of Appeals for the Sixth Circuit. However, the District Court did so with apparent reluctance on the basis of this Court's opinion in *Ross* v. *Moffitt,* 417 U. S. 600 (1974). The court noted that all the Sixth Circuit authority was decided before *Moffitt,* and that the law after *Moffitt* has without doubt become unsettled.

The District Court also criticized appellate counsel who continue to represent their client in subsequent

proceedings and assert their own ineffectiveness as the sole basis of relief (A 31-40).

Petitioner appealed to the Sixth Circuit. His appeal asserted that there is no right in the Constitution of the United States to the effective assistance of state-court appellate counsel, that assertion being discussed in six separate sections. The appeal asserted, among other things, that the right of appeal is not a Constitutional right but is created solely by state law.

The Sixth Circuit rendered its opinion on October 31, 1980, in an equal protection setting based upon facts not found in the District Court, and without an evidentiary hearing. That court concluded that respondent's appellate counsel was so overworked that he couldn't process the appeal. The Sixth Circuit determined that respondent has been deprived of the right to appeal his (state) conviction solely because his indigency status made the overworked public defender his only source of legal representation. Petitioner in District Court and before the Sixth Circuit had denied any invidious discrimination against respondent.

That Sixth Circuit concluded its opinion, affirming the District Court's result, by stating:

> In the District Court in our present case, the District Judge relied primarily upon a due process analysis based upon denial of counsel. In the event the largely equal protection rationale employed above is found inadequate to sustain this writ, alternatively we endorse the opinion authored by the District Judge * * *.

Thereafter, the Sixth Circuit stayed the issuance of its mandate, by order, pending petitioner's request for writ of certiorari in this Court.

ARGUMENT AND REASONS FOR GRANTING THE WRIT OF CERTIORARI

There Is No Constitutional Right to the Effective Assistance of *Appellate* Counsel, as Opposed to the Assistance of *Trial* Counsel.

The Constitutional question which this Court should accept and resolve is whether there is a right of effective assistance of state-court *appellate* counsel, as there is to *trial* counsel, under either due process or equal protection standards. If so, then this Court should decide whether such right will absolutely preclude state appellate courts from dismissing appeals based upon appellate counsel's procedural default. After all, what default by appellate counsel is worse than that which results in dismissal of the entire appeal?

The United States District Court below determined that there is a substantive due process Constitutional right to effective assistance of appellate counsel which precludes dismissal of state appeals. The United States Court of Appeals then used due process as an alternative basis to justify its equal protection case-by-case *factual* analysis to override the dismissal of the state appeal.[1]

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[1]It appears, *infra* at p. 20, that the United States Court of Appeals for the Sixth Circuit, by indirection, is asking this Court to review its opinion.

These federal courts reached this result knowing that federal courts themselves may dismiss appeals within their own jurisdiction under Rules 16.1 and 33.7 of this Court and Rule 31(c) of the Federal Rules of Appellate Procedure, under the same and similar factual circumstances, without violating the Constitution.

These questions are critically important to the Constitutional functioning of Kentucky's appellate courts and appellate procedures. In Kentucky, dismissal of appeals based upon failure to follow procedural rules is approved by the Commonwealth's Constitution, by procedural rule, and by decision of the Supreme Court of Kentucky. Numerous cases of this nature presently are being litigated in Kentucky courts and in federal habeas corpus courts on review. They apply to the circumstances which occur after the trial ends following felony conviction and after jurisdiction leaves the trial court and attaches in the appellate court.

The question then becomes, that while trial is Constitutionally fundamental, is state-court appeal also Constitutionally fundamental?

Unlike the Constitutional due process right to the assistance of trial counsel which arises from a specific Constitutional provision, the right of an indigent to appellate counsel arises, to the extent it may exist at all, from equal protection considerations of the Fourteenth Amendment.

If respondent has the right to effective assistance of appellate counsel, it must be a right wholly created by substantive due process. This Court has never so held, however, and its opinions on the matter indicate

that it will not so hold. The common practice, as seen in rules of dismissal in the federal system as well as among the states, indicates that such fundamental right does not exist.

To create such a right for the first time, moreover, would have severe adverse effects. State appellate courts could not exert effective control over the orderly processing of appeals, and finality of judgment would be destroyed. The federal judiciary, especially the district courts, would be forced to direct the administration of state appellate courts.

Under the authority of *McKane* v. *Durston,* 153 U. S. 684, at 687-688 (1894), state-court appeal is not a due process requirement of the Constitution:

> A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review.
>
> * * *
>
> It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper. * * * [W]hether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself.

Thus, Constitutional protection of life, liberty and property occurs only at trial, is extinguished at trial,

and Kentucky need have no appeal procedure whatsoever, as a matter of federal Constitutional law, the matter of appeal apparently having been reserved by the states unto themselves, Tenth Amendment, United States Constitution.

Through §§ 115-116 of its Constitution, Kentucky has created a system of limited and conditional appeal. That is, appeal may be taken only by following certain authorized rules of procedure. If those rules are not followed by all who would appeal, the appeal may be dismissed. The promulgation and enforcement of such procedural rules prevents chaos on appeal, enhances orderly and effective proceedings, and in fact provides all citizens with the equal protection of law. *Williams* v. *Payne,* Ky., 515 S. W. 2d 618, 619 (1974).

That appeal in Kentucky is not absolute is confirmed by (Ky.) CR 76.34(6), which provides that appeals may be dismissed in their entirety, and by *Cleaver* v. *Commonwealth,* Ky., 569 S. W. 2d 166 (1978), which approved dismissal of respondent's direct appeal from a murder conviction.

It is clear then, that Kentucky has created a conditional and limited system of appeal as approved by *McKane, supra.*

However, both the Sixth Circuit and the District Court erroneously concluded that in Kentucky appeal is absolute. Based upon that erroneous analysis of Kentucky law, both courts then proceeded to erect thereon an error of federal Constitutional law.

In so doing they did not address the reality, that if dismissal of appeals by federal courts based upon ap-

pellate counsel's procedural default is Constitutional, then so also must it be for state courts. It would be odd indeed for federal courts to impose Constitutional limitations upon state courts which they do not impose upon themselves. *Ross* v. *Moffitt,* 417 U. S. 600, at 617-618 (1974).

These federal rules buttress petitioner's argument. The violation of these rules which leads to their operation may be occasioned by the acts or omissions of appellate counsel. If violation of these rules automatically points to ineffective assistance by appellate counsel, or deprivation of appellate counsel, on Constitutional grounds, this Court could not countenance their existence and their enforcement would be worse than useless.

These federal rules are a practical application in federal jurisdiction of the logic expressed in *McKane, supra,* and in *Moffitt, supra* and *infra,* that there is no Constitutional due process right to a state criminal appeal or any of its parts. Since criminal appeals in federal law were unknown prior to 1889, *Carroll* v. *United States,* 354 U. S. 394, 400-401, n. 9 (1957), it is seen that no substantive or fundamental due process right to appeal arises from the Constitution. Logically and historically, therefore, there can be no Sixth Amendment right to effective assistance of *appellate* counsel. The Constitutional right to effective assistance of *trial* counsel is derived from the Sixth Amendment, *Beasley* v. *United States,* 491 F. 2d 687 (6th Cir., 1974), which is made applicable to the states through the Due Process Clause of the Fourteenth

Amendment, *Gideon* v. *Wainwright,* 372 U. S. 335 (1963). The Sixth Amendment applies only to *trial* counsel and does not apply to *appellate* counsel.

Appeals and appellate counsel were unknown to federal law when the Sixth Amendment was adopted, and they remained unknown for another one hundred years, *Carroll, supra.* Appeal, it therefore is seen, is not a fundamental and independent Constitutional right to protect life, liberty or property. Such protection occurs at trial, and the failure of appellate counsel to timely file a brief on appeal does not offend the Sixth Amendment. Whatever happens in appellate court is not governed by due process standards which apply at trial. Those fundamental trial standards simply cease to exist when appeal commences, *McKane, supra,* and *Moffitt, supra* and *infra.*

Thus, the *McKane* law that appeals may be limited and conditioned upon procedural rules prevails in United States law in just the same manner as it prevails in Kentucky law. That is, counsel's acts or omissions on appeal simply do not offend the Constitution as a matter of due process, *Moffitt, supra* and *infra,* and respondent is without any federal remedy as regards his state-court appellate default. Of course, any allegation of violation of a Constitutional right at state *trial* could be vindicated by resort to habeas corpus in federal court. Interestingly, respondent in all the time he has spent in federal courts has *never* alleged in federal court that his state *trial* resulted in denial of a Constitutional right.

That being the case, petitioner submits that there can be no Constitutional right to effective assistance of *appellate* counsel on appeal, at least as such assistance applies to trial counsel in the fundamental arena of the trial court. After all, what default by appellate counsel can be worse than that default which leads to dismissal of the entire appeal? *McKane, supra.*

The reason there is no Constitutional right to state appeal or to prohibition of dismissal of appeal, or to effective assistance of appellate counsel, is articulated in *Moffitt, supra,* at 610-611, as follows.

Trial is fundamental. Appeal is not fundamental. A state trial court may not dispense with trial without the consent of the criminal defendant. A state appellate court, however, may dispense with appeal without the appellant's consent. Appeal, therefore, is no part of trial. Trial and appeal are significantly different and accomplish different things.

Accordingly, at some point the trial must end and the appeal, if any, begin. So do the duties of trial counsel end and the different aspects of appellate counsel representation begin. Kentucky law marking this point of change, *Hoy* v. *Newburg Homes, Inc.*, Ky., 325 S. W. 2d 301, 302 (1959) is binding upon federal courts, because any grant or privilege of state appeal is not a matter of fundamental due process under the Constitution.

The creation of appeal for criminal defendants, as well as the conditions of its taking, is entirely dependent upon the wisdom of state law, *McKane, supra.* That is, whether any appeal exists in any form at all

in Kentucky is entirely a Kentucky consideration and states may attach such conditions and limitations to appeal as they alone see fit, without offending due process. *McKane, supra.* Since the assistance of appellate counsel is ancillary to the non-fundamental grant of state appeal ,assistance of appellate counsel can rise to no greater due process status than the appeal itself.

Sections 115-116 of the Kentucky Constitution and the rules promulgated thereunder are entirely consistent with due process requirements. Respondent under the United States Constitution not being entitled to an appeal at all in Kentucky, except for the Kentucky Constitutional procedure granting one under conditions and limits, thus has no federal entitlement beyond what §§ 115-116 provide.

Therefore, dismissal of a state-court appeal does not offend the Constitution on due process grounds. Conceptually, for a person in respondent's present position, the right of appeal simply does not exist as a matter of state law. Thus a right of state appeal does not exist as a matter of Constitutional law.

And equal protection considerations, which must be made on a case-by-case factual basis, cannot elevate an appellant to an exalted position so that he may disregard state procedural requirements which all who would appeal must follow, as will be seen, *infra.*

Moffitt, supra, is important in another regard. It represents the first apparent attempt by this Court to come to grips with a generation of imprecise and ambiguous opinions which it has written in the area of

state-court appeal. Those opinions begin with *Griffin* v. *Illinois,* 351 U. S. 12 (1956), and *Douglas* v. *California,* 372 U. S. 353 (1963).

This *Griffin-Douglas* line of opinions, without ever identifying and explaining the Constitutional source of the asserted appeal right, tends to raise for the first time the idea that there may be a Fourteenth Amendment due process right under the Constitution to effective assistance of counsel on state-court appeal, and that it somehow may be buttressed by equal protection.

Moffitt, at 608-609, takes particular notice of this imprecise analysis and unidentified source of the asserted Constitutional right to state-court appeal, as expressed in this Court's *Griffin-Douglas* line of opinions:

> The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment. *Neither Clause by itself provides an entirely satisfactory basis for the result reached,* each depending on a different inquiry which emphasizes different factors . "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. (emphasis added).

Petitioner submits that the *Griffin-Douglas* line of cases does not stand for the proposition that there is a due process right to effective assistance of appellate couunsel, as opposed to trial counsel, on state-court appeal. To do so would be to overrule *McKane, supra,* and its continuing vitality is explicitly confirmed by *Moffitt, supra,* at p. 606.

Moffitt is the most direct examination made by this Court in the area of due process rights, if any, on state-court appeal, and clearly questions the Constitutional basis and reach of this Court's *Griffin-Douglas* line of statements on the matter. *Moffitt,* then, is seen as the first step taken by this Court to limiting the *Griffin-Douglas* sway, and adhering to the clear teaching of *McKane,* as regards state appeals procedures. Even the District Court below recognized that *Moffitt* is a turning point by this Court in this area, but nevertheless felt bound by the Sixth Circuit's pre-*Moffitt* decisions.

The Sixth Circuit, in upholding the *result* of the District Court below did so by a different method. Finding facts which had not been found or even inquired into by the District Court, the Sixth Circuit declared that dismissal of respondent's state-court appeal was an equal protection violation, and alternatively a due process violation.

Petitioner questions the accuracy of the Sixth Circuit's own fact-finding, and also questions the propriety of appellate fact-finding, especially in regard to a Constitutional question of this dimension, in the ab-

sence of any prior consideration or evidentiary hearing by the District Court.

Contrary to the assertion of the Sixth Circuit, it appears that the record does not show without dispute that respondent "was denied counsel to process his appeal, while other persons in Kentucky convicted of crimes who had the financial means to do so would have been able to perfect their appeals and receive adjudication of them" by Kentucky's highest court. Petitioner in the District Court (JA 98) asserted that respondent was not subjected to invidious discrimination, a point explicitly reiterated in his Sixth Circuit appeals brief at pages 20 and 48. The Sixth Circuit's equal protection rationale was squarely based upon respondent's indigency and what that court saw as his resulting discriminatory treatment on equal protection grounds. In this regard, it must be noted that the District Court explicitly determined that respondent in that court did not assert an equal protection deprivation as part of his habeas corpus claim, but only a due process deprivation. That being the case, how could petitioner deny an equal protection violation any more explicitly than he did.

It is the responsibility of one who claims a Constitutional deprivation in habeas corpus court to say what it is. That is the only way the custodian and court can answer and consider the charge. Instead of asserting that petitioner never disputed the deprivation found by the Sixth Circuit, the Sixth Circuit instead should have noted respondent's own non-as-

sertion in the District Court of an equal protection claim, and then refused to consider it.

The case of *Lucey* v. *Seabold*, No. 79-3752, was argued before the Sixth Circuit at the same time the present case was argued. The appellate counsel who defaulted there, leading to dismissal of the Kentucky appeal, was *retained*. As to this writing, no decision has been rendered by the Sixth Circuit in *Lucey*.[2]

Examination of the Sixth Circuit opinion will show that it makes no reliance for its result on authority of this Court, and that it does not identify the Constitutional source of the right it proclaims. It does, nevertheless, create a substantive Constitutional right to state-court appeal and absolutely overrides state-court appeal procedures. And it does so in the absence of proper claim in the District Court, in the absence of supportive fact-finding by the District Court, and in the face of the District Court's observation that *Moffitt* has left the last generation of this Court's pronouncements in the area of state appeal quite unsettled.

The Sixth Circuit concluded its opinion below with this remarkable assertion of its own Constitutional uncertainty about what it had just done:

> In the District Court in our present case, the District Judge relied primarily upon a *due process*

[2]The Sixth Circuit also asserts that the *Court of Appeals* of Kentucky denied respondent's motion for an extension of time and then dismissed his appeal. Of course, this was done instead by the Supreme Court of Kentucky. The Sixth Circuit also asserts that the Supreme Court of Kentucky dismissed the second attempt at appeal following a hearing. It appears that no evidentiary hearing was held, but an appellate oral argument.

> analysis based upon denial of counsel. In the event the largely *equal protection* rationale employed above is found inadequate to sustain this writ, alternatively we endorse the opinion authored by the District Judge * * *. (emphasis added) (A 30).

It is clear that the Sixth Circuit was uncertain about whether to justify its opinion upon due process or upon equal protection grounds. It also is clear that nowhere did that court identify and explain the source of the purported Constitutional right it proclaimed. It appears, in fact, that the Sixth Circuit may be asking this Court to resolve the matter. This is because only this Court has the power to find that an equal protection rationale is inadequate to sustain the writ of habeas corpus. Thus, it is to this Court that the Sixth Circuit's fear of reversal of its equal protection opinion had to be addressed.

The only assertable Constitutional requirement regarding appeal and appellate counsel, based upon equal protection considerations, is that the state treat everyone substantially the same as regards appeals.

Here, respondent nowhere alleged that he was singled out to arbitrarily cut off his appeal or that Kentucky's rules are other than neutral on their face. There has been no showing that Kentucky left the appeal door open for more affluent persons who did not follow its rules, nor do the facts of record so indicate.

Equal protection prohibits discrimination which is either invidious or without a rational basis, or discrimination that is based upon race, creed, color or similar

suspect classification. Equal protection means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. *Mallett* v. *North Carolina,* 181 U. S. 589, 598 (1901).

The Constitutional right to appellate counsel itself, to the extent it may exist, arises from the Equal Protection Clause of the Fourteenth Amendment, *Anders* v. *California,* 386 U. S. 738 (1967). The protection afforded to an appellant is strictly limited by the ambit of the equal protection clause, *Moffitt, supra.* Accordingly, unless the procedural default in failing to timely file the brief on appeal was occasioned by invidious discrimination against an appellant, the limited equal protection right of *Anders, supra,* is not violated. Further, unless the procedural default was occasioned by the creation by the state of an unfair advantage for itself, no right of *Moffitt, supra,* is violated.

There is no showing that the procedural default on direct state appeal was occasioned here by unfair advantage. Kentucky's system of appeal is rational and is neutral on its face and in its application. All persons are treated fairly and equally under Kentucky's system of appeal which, in the first place, is not itself a requirement of the Constitution. Any appeal would have been dismissed for anyone under the procedural default which occurred here. Violation of the Rules, whether by appointed or retained counsel, triggers dismissal.

In this regard, petitioner reiterates that this Court in *Moffitt, supra,* has taken the first step in dealing with the Constitutional haziness which may have led to the Sixth Circuit opinion, and which also tries to implicate fundamental due process standards for the first time.

The Sixth Circuit has violated this Court's authority in *McKane, supra,* and *Moffitt, supra,* as well as that which is embodied in Rules 16.1 and 33.7 of this Court and 31(c) of the Circuit Courts. Further, it has violated the principles of comity and federalism which this Court has so strongly announced in such opinions as *Francis* v. *Henderson,* 425 U. S. 536 (1976), and its respect for state procedures, as in *Wainwright* v. *Sykes,* 433 U. S. 72 (1977). This strong policy of federalism and respect applies even when proceedings in the fundamental *trial* arena are at issue.

In turning from the teachings of this Court, the Sixth Circuit has created untenable and unconstitutional problems for the appeals process in Kentucky and in the other states.

The question presented here is of plenary national importance, because it implicates state appellate procedures in the entire United States. That is, if Kentucky courts cannot dismiss appeals under state Constitutional authority, based upon acts or omissions of appellate counsel who thereby automatically and *per se*

render Constitutionally ineffective assistance, then neither can the courts of any other state.[3]

While this inability to dismiss appeals exists in the courts of Kentucky and of the other states, everyone involved will know absolutely that federal courts still allow themselves to dismiss appeals without offense to the Constitution, be it for reasons of appellate counsel's ineffectivenes or for other grounds. Everyone will understand the Orwellian observation, that while all court rules and procedures are equal, some court rules and procedures are more equal than others.

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[3]The Fourteenth Amendment protects liberty and property interests without apparent distinction. To say that a state court cannot dismiss a *criminal* appeal because of appellate counsel's procedural default is to say that state courts similarly cannot dismiss *civil* appeals based upon appellate counsel's procedural default.

CONCLUSION

Petitioner submits that this is a question of plenary national importance which should be accepted for resolution under the authority of this Court's Rules 17.1(a) and (c).

Respectfully submitted,

STEVEN L. BESHEAR
Attorney General

J. GERALD HENRY
Assistant Attorney General
Counsel of Record
Capitol Building
Frankfort, Kentucky 40601
Telephone: (502) 564-4044
Counsel for Petitioner

PROOF OF SERVICE

I, J. Gerald Henry, counsel of record for petitioner, hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari were mailed by United States mail, with first class postage prepaid, to Mr. Jack Emory Farley and Mr. William M. Radigan, Office of Public Advocacy, State Office Building Annex, Frankfort, Kentucky 40601, counsel for respondent, and that all parties required to be served have been served, all on this January 26, 1981.

J. GERALD HENRY
Assistant Attorney General
Counsel of Record for Petitioner

APPENDIX

No. 79-3514

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GEORGE H. CLEAVER,
Petitioner-Appellee,

v.

DONALD E. BORDENKIRCHER,
Superintendent, Kentucky State Penitentiary,
Respondent-Appellant.

APPEAL from the United States District Court for the Eastern District of Kentucky

Decided and Filed October 31, 1980
(Entered October 31, 1980)

Before: EDWARDS, Chief Judge, ENGEL and JONES, Circuit Judges

EDWARDS, Chief Judge. Respondent warden appeals from an order of the United States District Court for the Eastern District of Kentucky granting appellee Cleaver's petition for a writ of habeas corpus.

The facts show that Cleaver had been convicted in a Kentucky State Court on an indictment charging murder and robbery in the first degree. He was sentenced to life imprisonment. His counsel at trial was a court-appointed public defender who filed the appropriate notice of appeal in timely fashion.

After repeated extensions to allow for the filing of the record on appeal, the public defender was faced with a 40-day limitation on the filing of his appellate brief. Detailing

the work in other cases assigned to him which he had to accomplish during the time span involved, Cleaver's counsel sought a 30-day extension which the Supreme Court granted "as a final extension." At the end of that 30 days, and on the date when the appellate brief was required to be filed, the same counsel filed a motion requesting an additional 30-day extension, giving as reasons the following:

> During the next ten (10) days, the undersigned counsel has seven (7) appellate briefs which are scheduled to be filed with this Court and the Court of Appeals. In an attempt to complete as many of these pleadings as possible, the undersigned counsel has been forced to devote a majority of his available time to completing other cases to the detriment of appellant's appeal. The requested additional time is required to allow the undersigned counsel to devote the time to appellant's case which is necessarily required by its complexity and length.

The public defender's motion continued:

> Under *Anders* v. *California*, 386 U. S. 738, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493 (1967), appointed counsel's "role as advocate requires that he support his client's appeal to the best of his ability." Under our adversary system, it has become a well-established principle that there is no substitute for counsel who acts as an advocate and who makes the best arguments he can on the facts and the law. *High* v. *Rhay*, 519 F. 2d 109, 113 (9th Cir. 1975), citing *Anders* v. *California*, *supra*. Accordingly, when an appointed counsel in a criminal appeal because of his total volume of work is unable to devote sufficient time to complete a professionally competent appellate brief within the allotted time period, his only recourse is to seek an extension of time from

> the appellate court. If the appointed counsel declines to request an extension and instead files a perfunctory brief, the indigent appellant is denied the effective assistance of counsel on appeal, a right which he is guaranteed by the Sixth Amendment.

The Kentucky Court of Appeals denied this motion for an additional extension. It also dismissed the appeal. When counsel went back to the trial court and sought and received an order reinstating the appeal, the Supreme Court held a hearing and decided that the trial court had no authority to readjudicate a procedural issue already decided by the highest court of the state. It again dismissed the appeal.

While there is no doubt as to the validity of this last ruling, the net result of the entire procedure is that the record shows, without dispute, that appellee Cleaver was denied counsel to process his appeal, while other persons in Kentucky convicted of crimes who had the financial means to do so would have been able to perfect their appeals and receive adjudication of them by the highest court in the state.

The District Judge who issued this writ did so on the basis of his view that appellant had been denied the effective assistance of counsel, relying in part upon *Douglas* v. *California*, 372 U. S. 353 (1963), and *Anders* v. *California*, 386 U. S. 739 (1967), and distinguishing *Ross* v. *Moffitt*, 417 U. S. 600 (1974).

Petitioner Cleaver, of course, has no federal constitutional right to appeal his state court conviction. *McKane* v. *Durston*, 153 U. S. 684 (1894). He has, however, a state constitutional right of appeal (Kentucky Constitution

§ 110(2)(b)[1]). This right cannot be regarded as having been vindicated by the appointment of a public defender who is so overloaded with work as to be unable to service his appeal as of right. Deprivation of counsel on this ground cannot, of course, be established merely by the public defender's assertion. Here, however, the facts alleged by the public defender concerning overload have not been disputed either in the proceedings before the State's highest court or in the briefing and argument in this federal habeas proceeding.

We recognize that the Attorney General does claim that "there is no proof that the state withheld adequate funds or staff to process indigent appeals." The record in this case is, however, proof to the contrary of this assertion and the same may be said of the record currently before us in *Brown* v. *Smith*, ____ F. 2d ____ (6th Cir. 1980) (No. 79-3589), wherein a similar habeas writ has been granted on similar facts by another United States District Judge.

The Attorney General also asserts, "The proper procedure would have been to request the assignment of additional personnel to handle the increased caseload." We do not, however, think that proving where the budget-making processes or personnel assignment procedures of the Commonwealth of Kentucky broke down is an appropriate burden to place upon an indigent habeas petitioner or his counsel. The state-appointed counsel for this defendant has stated that he could not perform his responsibility to perfect appellant's appeal because of an excessive workload. This assertion, if untrue, could have been contested,

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[1] "Appeals from a judgment of the Circuit Court imposing a sentence of death or life imprisonment or imprisonment for twenty years or more shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as provided by its rules." Kentucky Constitution § 110(2)(b).

but was not. It stands undenied on this record. An affluent defendant who sought to retain an overburdened lawyer could and would have hired another. This petitioner was denied equal protection of the law by being denied the right to appeal which Kentucky granted to others by its Constitution.

On this record we must conclude (and do) that the reason the public defender was delinquent in observing the time limitations facing him in processing this appeal was an overload of other appellate work before the Supreme Court of Kentucky, and that this overload rendered observance of the time limitation in this case impossible.

We recognize Kentucky's right to decide, in the first instance, any disputed issue of fact concerning representations of work overload by counsel supplied by the State. If inaccurate claims are tendered, Kentucky can take measures to discipline any lawyer found to be untruthful in such representations, or willfully or negligently delinquent. We believe, however, that the facts upon which we rely in this case are undisputed. As a result of them petitioner has been deprived of the right to appeal his conviction solely because his indigency status made the overburdened public defender his only source of legal representation. In *Ross* v. *Moffitt*, 417 U. S. 600 (1974), the Supreme Court said:

> The cases encompassed a variety of circumstances but all had a common theme. * * *
>
> [They] stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons. *Ross* v. *Moffitt, supra* at 606-07.

In *Ross* v. *Moffitt, supra*, the opinion of the Court also observed that the entitlement to appellate counsel (where the state grants an absolute right to appeal) implicates

both the equal protection clause and the due process clause. *Id.* at 608-09.[2]

In the District Court in our present case, the District Judge relied primarily upon a due process analysis based on denial of counsel. In the event the largely equal protection rationale employed above is found inadequate to sustain this writ, alternatively we endorse the opinion authored by the District Judge and dated May 29, 1979.

The judgment of the District Court is affirmed.

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[2]The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Proces Clause of that Amendment. Neither Clause by itself provides an entirely satisfactory basis for the result reached, each depending on a different inquiry which emphasizes different factors. "Due process" emphasizes fairness between the State and th individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. We will address these issues separately in the succeeding section. *Ross* v *Moffitt*, supra at 608-09. (footnote omitted).

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 78-204

GEORGE H. CLEAVER - - - - - *Petitioner*

v.

DONALD E. BORDENKIRCHER, Warden, Kentucky State Penitentiary - - - - *Respondent*

ORDER (Entered May 31, 1980)

In conformity with the Memorandum Opinion filed herein this date,

IT IS ORDERED HEREIN AS FOLLOWS:

(1) That the petition for a writ of habeas corpus be, and the same hereby is, GRANTED.

(2) That this Order be, and the same hereby is, STAYED for a period of sixty (60) days from this date.

(3) That the Commonwealth of Kentucky shall, within sixty (60) days of the date of this Order, notify the Court as to whether petitioner's appeal has been reinstated.

(4) That, if at the end of sixty (60) days, no notice of reinstatement of petitioner's appeal has been filed, the writ sought herein shall issue without further order of the Court.

This the 29th day of May, 1979.

(s) H. David Hermansdorfer, Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 78-204

GEORGE H. CLEAVER - - - - - *Petitioner*

v.

DONALD E. BORDENKIRCHER, Warden, Kentucky State Penitentiary - - - - *Respondent*

MEMORANDUM OPINION—Filed May 30, 1979
(Entered May 30, 1980)

Petitioner herein was convicted on February 5, 1976 in the Johnson Circuit Court of robbery and murder and was sentenced to imprisonment for life. On direct appeal of right to the Kentucky Supreme Court petitioner was represented by the Kentucky Public Advocate who failed to timely file petitioner's appellate brief. After a final extension deadline passed, the appeal was dismissed. By order of October 25, 1977, the Johnson Circuit Court, apparently in response to the Public Advocate's motion alleging ineffective assistance of appellate counsel, reinstated petitioner's right to appeal. Petitioner refiled his appeal; but at oral argument the Supreme Court dismissed, without reaching the merits of the ineffective assistance claim, on the ground that the Circuit Court was without jurisdiction to reinstate petitioner's right to appeal. *Cleaver* v. *Commonwealth*, Ky., 569 S. W. 2d 166 (1978).[1] Still represented

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[1]Wherein the procedural history of petitioner's case in the Kentucky Courts is set forth fully.

by the Public Advocate, petitioner filed his application for a writ of habeas corpus in this Court on October 17, 1978, and by general order the matter was referred to the United States Magistrate at Ashland/Catlettsburg, Kentucky. The Court is now in receipt of the Magistrate's report, which recommends that the writ issue unless Kentucky retires petitioner or reinstates his appeal, and of the Commonwealth's scholarly particularized objections to that report. The matter is thus before this Court for *de novo* review.

The issues presented are (1) whether petitioner has a constitutionally protected right to effective assistance of counsel on direct mandatory appeal to the Kentucky Supreme Court, (2) what are the source and hence the parameters of that right if it exists, and (3) whether that right, if it exists, was violated by the failure of the Public Advocate to timely file petitioner's appellate brief which caused the dismissal of petitioner's appeal.

Petitioner argues that he has such a right and that this right was violated by the omissions of the Public Advocate and the dismissal of the appeal. In response the Commonwealth argues that petitioner has no constitutionally protected right to appeal, but only a state-created right subject to federal equal protection guarantees. Thus it is reasoned that petitioner's only right to effective assistance of counsel on appeal consists of a right to be free from irrational discrimination in the quality of the representation available based on his indigent status. Here, the Commonwealth points out, the dismissal of the appeal resulted not from discrimination against an indigent, but from the even-handed application of the appellate rule which sets a time limit for the filing of briefs. Indeed, petitioner does not allege that the Kentucky rules were applied in a discriminatory way to deprive him of an appeal because of his indigency; therefore it will be assumed that no Equal Protection violation has occurred and that unless peti-

tioner's asserted right to counsel on appeal has some basis other than the Equal Protection Clause of the Fourteenth Amendment, his petition must be denied.[2] To analyze the arguments the Court must look to three lines of cases—those defining the Sixth Amendment right to counsel in state trials, those setting the parameters of the rights of indigents on appeal, and those Sixth Circuit cases dealing with assistance of counsel on appeal.

The Sixth Amendment guarantees that a federal criminal defendant shall ". . . have the assistance of counsel for his defense." Assistance of counsel means *effective* assistance of counsel. *Avery* v. *Alabama*, 308 U. S. 444 (1940). The Sixth Amendment guarantee of effective assistance of counsel is a fundamental right and is therefore imposed upon the states by the Due Process Clause of the Fourteenth Amendment. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). To determine whether assistance of counsel at a criminal trial has met the requirements of the Sixth Amendment, the Sixth Circuit Court of Appeals applies a test which asks whether the representation supplied was ". . . reasonably likely to render and rendering reasonably effective assistance. . . . Defense counsel must perform at least as well as a lawyer with ordinary training and skill in criminal law and must conscientiously protect his client's interest . . . (citations omitted)." *Beasley* v. *United States*, 491 F. 2d 687, 696 (6th Cir. 1974). If, in

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[2]As to the possible significance, not addressed by the parties herein, of the fact that the attorney whose omission was the basis of the petition was paid by the Commonwealth rather than privately retained, *see*, *Cantrell* v. *Alabama*, 546 F. 2d 652 (5th Cir. 1977); *Fitzgerald* v. *Estelle*, 505 F. 2d 1334 (5th Cir.) (en banc), *cert. denied*, 422 U. S. 1011 (1975); *Goodwin* v. *Cardwell*, 432 F. 2d 521 (6th Cir. 1970) (O'Sullivan, J., dissenting); and *United States ex rel. Smith* v. *McMann*, 417 F. 2d 648 (2d Cir. 1969), *cert. denied*, 397 U. S. 925 (1970) (Friendly, J., dissenting).

the case at bar, counsel's failure to timely present an argument had occurred at trial and resulted in a conviction rather than a dismissal of appeal, there is little doubt that it would be deemed ineffective assistance under *Beasley* and require the issuance of the writ applied for. *Wilson* v. *Phend*, 417 F. 2d 1197 (7th Cir. 1969); *see also*, *Reece* v. *Georgia*, 350 U. S. 85 (1955).

The question that remains is how the fact that counsel's omission here occurred at the appeal stage affects petitioner's claim. The cases on indigents' post-conviction rights show that there is no federal constitutional right to appeal. *Ross* v. *Moffitt*, 417 U. S. 600 (1974); *Norris* v. *Wainwright*, 588 F. 2d 130, 137 (5th Cir. 1979). When a state grants a right to appeal criminal convictions, it may impose conditions upon the exercise of that right. *Ross*, *supra*, at 417; *McKane* v. *Durstan*, 153 U. S. 684 (1894). In *Douglas* v. *California*, 372 U. S. 353 (1963), it was held that where the state provides for an appeal of right, the Fourteenth Amendment prohibits it from conditioning the appointment of appellate counsel for indigents upon a preliminary determination by the Court of Appeals that the appeal is meritorious since to do so draws ". . . an unconstitutional line . . . between rich and poor." *Id.* at 357. Mr. Justice Douglas' opinion in *Douglas* was based predominantly on the Equal Protection Clause, but his statement that "[w]hen an indigent is forced to run this gauntlet of a preliminary showing of merit [without assistance of counsel] the right to appeal does not comport with fair procedure . . . ." *Id.* at 357, indicates that he thought the right to counsel on appeal also had a Due Process component.

In *Anders* v. *California*, 386 U. S. 738 (1967), appointed appellate counsel reviewed appellant's trial record and informed the appellate court that the appeal was without merit. Appellant moved for appointment of substitute

counsel, and his motion was denied. He then filed his *pro se* appellate brief. The Court, after examining the record, affirmed the conviction. The United States Supreme Court, citing *Gideon* v. *Wainwright, supra,* held that the practice of allowing appointed counsel to effectively withdraw from an appeal upon his own determination of lack of merit and then requiring appellant to proceed *pro se* was one in which "[t]he constitutional requirement of substantial equality and fair process . . ." had not been fulfilled. *Anders* v. *California, supra* at 744. As in *Douglas, supra,* it is unclear whether the Court meant that petitioner had a Due Process right to counsel on appeal regardless of his indigent status or that petitioner had an Equal Protection right to counsel since non-indigents were not subject to the Court's discretionary refusal to appoint substitute counsel once the attorney commencing the appeal pronounced it nonmeritorious.

In *Ross* v. *Moffitt, supra,* the Court held that neither the Due Process or the Equal Protection Clause imposes a duty on a state to provide counsel for indigent defendants who have exhausted their mandatory appeal right and are pursuing a discretionary appeal. Mr. Justice Rehnquist's analysis of the Due Process component in *Ross* can be interpreted by the Commonwealth in this case, as a repudiation of the language in *Douglas* and *Anders* which seems to find a Due Process as well as an Equal Protection basis for indigents' right to counsel on appeal. *Ross* v. *Moffitt, supra* at 609-11.

Given the lack of clarity in the Supreme Court cases as to the basis and therefore the extent of the right to effective assistance on appeal, the Court must look to certain Sixth Circuit decisions dealing with claims of ineffective assistance of counsel at the post-trial stages of

criminal proceedings.[3] In *Boyd* v. *Cowan*, 519 F. 2d 182 (6th Cir. 1975), it was held that the convicted state defendant's right to effective assistance of counsel on appeal was violated when his appointed trial counsel failed to tell him that he (the lawyer) would not file and process an appeal with the result that pretitioner's time for filing notice of appeal lapsed. In *Woodall* v. *Neil*, 444 F. 2d 92 (6th Cir. 1971), the Court held that where a habeas corpus petitioner alleged that, after his state trial, retained counsel had contrary to petitioner's instructions failed to perfect an appeal, allowing petitioner's time to run; petitioner had stated a cause of action for ineffective assistance of counsel. In *Goodwin* v. *Cardwell*, 423 F. 2d 521 (6th Cir. 1970), petitioner was held to have stated a claim of ineffective assistance of counsel where he alleged that retained trial counsel had failed to inform him of his right to appeal. In his strong dissent, Judge O'Sullivan apparently conceded that, had petitioner been represented by appointed counsel, he would have been entitled to a hearing on ineffective assistance. *Id.* at 523-24 (O'Sullivan, J., dissenting), In *Benoit* v. *Wingo*, 423 F. 2d 880 (6th Cir.), *cert. denied*, 400 U. S. 852 (1970), petitioner's appointed trial counsel commenced an appeal from his state conviction but then withdrew; the appeal was dismissed. Citing *Douglas* v. *California, supra*, the Court held simply that "[t]he indigent is entitled to have counsel to assist him on appeal [citations omitted]." *Benoit* v. *Wingo, supra* at 882. All of these cases seem to recognize a Due Process right to effective assistance of counsel on appeal, albeit none of them includes an explicit statement of the source of the right.

The Commonwealth argues that the above cases are not controlling because they found ineffective assistance of

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[3]These cases would themselves dispose of the questions presented here were it not for the fact that they were all decided before *Ross* v. *Moffitt, supra*. See further discussion *infra*.

trial, not appellate, counsel. The simple answer to this argument is that the errors complained of occurred *after* the trial stage and involved either failure to commence or failure to prosecute an appeal. To argue that these were not appellate errors borders on sophistry. The more substantive objection to these cases is that they were all decided before *Ross* v. *Moffitt, supra.* They were therefore decided without the benefit of the language in that case which the Commonwealth argues should be read to restrict the right of effective assistance of counsel on appeal to the ambit of Equal Protection.

A thorough review of the law having been made, it is clear that indigents have *at least* an Equal Opportunity right to effective assistance of counsel on mandatory appeal. But this does not help petitioner herein because no offensive discrimination between rich and poor is claimed. Unless the Court determines that he has a Due Process right to assistance of counsel meeting the standard of *Beasley* v. *United States, supra,* his petition must be denied. There is no doubt the law is unsettled after *Ross* v. *Moffitt, supra.* Given the context of the Due Process analysis in *Ross, i.e.,* the Court was concerned with a discretionary appeal taken after appellant had lost on his mandatory appeal even with ample assistance of counsel; given the fact that the *Ross* court could have overruled *Douglas* v. *California, supra,* and *Andrews* v. *California, supra,* but chose not to do so; and given the Sixth Circuit cases citing *Douglas* and *Anders* in finding ineffective assistance by both retained and appointed appellate counsel; it must be concluded that, as the law now stands, petitioner herein has a Due Process right to assistance of counsel on mandatory appeal which satisfies the standard of *Beasley* v. *United States, supra.*

The Public Advocate has conceded and the Commonwealth does not controvert that the Public Advocate's fail-

ure to timely file petitioner's appellate brief after three extensions is representation less effective than that expected of ". . . a lawyer with ordinary training and skill in criminal law. . . ." *Id.* at 697. As the Supreme Court stated in *Ross,* the case most heavily relied on by the Commonwealth, a state criminal defendant is entitled to have his ". . . claims of error . . . organized and presented in a lawyerlike fashion to the Court of Appeals. . . ." *Ross* v. *Moffitt, supra* at 615. Because of the Public Advocate's failure to adequately represent him, petitioner was deprived of such a presentation.

Mr. Justice Rehnquist said in *Ross* that professional legal assistance on appeal is a sword rather than a shield and implied that the state has no Due Process duty to thus arm a convicted defendant. It is the holding of this Court that if the state *does* hand the defendant the sword of post-conviction assistance of counsel, it must be of steel, not paper. The state need not guarantee that it will cut as will the best of swords; it must, however, insure that once the defendant puts his faith in the weapon provided him, it will not crumble against the first routine procedural

shield the state throws up.[4] This does not conflict with the holding or the analysis on *Ross*.

For the reasons set forth above, the writ prayed for herein shall be granted unless the Commonwealth reinstates petitioner's appeal within sixty (60) days. An order in conformity herewith shall issue this date.

This the 29 day of May, 1979.

(s) H. David Hermansdorfer, Judge

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[4]The state must, in other words, insure that appellants' legal weapons are welded by persons reasonably skilled in their use. In connection with this and pursuant to this Court's supervisory, rather than its review, powers, the Office of the Public Advocate of Kentucky is advised not to assign any matter to be filed or which is pending in this Court to any attorney whose own ineffectiveness or incompetency is among the grounds asserted for relief. Any attorney who has asserted his own incompetency to handle trial matters in any forum shall make that fact known directly to the Court so that an appropriate determination can be made as to the qualifications of such attorney to practice before it. The Public Advocate's Office shall advise the Court as to what disciplinary action or retraining has taken place with respect to such attorney. Every criminal defendant is entitled or right to be represented by ". . . a lawyer with ordinary training and skill in criminal law." *Beasley* v. *United States, supra* at 697. To continue the use of admittedly incompetent attorneys does not serve the reasonable ends of justice.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 79-3514

GEORGE H. CLEAVER - - - *Petitioner-Appellee*

v.

DONALD E. BORDENKIRCHER, Superintendent
Kentucky State Penitentiary - *Respondent-Appellant*

BEFORE: EDWARDS, Chief Circuit Judge, ENGEL and JONES, Circuit Judges

ORDER STAYING MANDATE

(Entered December 1, 1980)

ORDERED, That motion staying mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for seventy-five days from this date; provided that, if within such seventy-five days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied within such seventy-five days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

THE CONSTITUTION OF THE UNITED STATES

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

* * * * * * *

Amendment 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

* * * * * * *

Amendment 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment

of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

* * * * * * *

SUPREME COURT OF THE UNITED STATES
RULE 16.1

1. Within 30 days after receipt of the jurisdictional statement, unless the time is enlarged by the Court or a Justice thereof, or by the Clerk under the provisions of Rule 29.4, the appellee may file a motion to dismiss, or a motion to affirm. Where appropriate, a motion to affirm may be united in the alternative with a motion to dismiss, provided that a motion to affirm or dismiss shall not be joined with any other pleading. The Clerk shall not accept any motion so joined.

(a) The Court will receive a motion to dismiss an appeal on the ground that the appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or with these Rules.

(b) The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

(c) The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause repends are so unsubstantial as not to need further argument.

(d) The Court will receive a motion to dismiss or affirm on any other ground the appellee wishes to present as a reason why the Court should not set the case for argument.

* * * * * * *

RULE 33.7

7. The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party wherein he has failed to comply: the filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted. If the Court shall find that the provisions of this Rule have not been adhered to, it may impose, in its discretion, appropriate sanctions including but not limited to dismissal of the action, imposition of costs, or disciplinary sanction upon counsel. See also Rule 38 respecting oral argument.

* * * * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

RULE 31(c)

(c) Consequence of Failure to File Briefs. If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file his brief, he will not be heard at oral argument except by permission of the court.

* * * * * * *

No. 80-1278

FILED
APR 20 1981
ALEXANDER L. STEVAS

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DEWEY SOWDERS, Warden,
Kentucky State Penitentiary - - - Petitioner

versus

GEORGE H. CLEAVER - - - - Respondent

SUPPLEMENTAL BRIEF FOR PETITIONER, WITH APPENDIX, TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STEVEN L. BESHEAR
Attorney General

J. GERALD HENRY
Assistant Attorney General
Counsel of Record
Capitol Building
Frankfort, Kentucky 40601
Telephone: (502) 564-4044
Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1278

DEWEY SOWDERS, Warden,
Kentucky State Penitentiary - - *Petitioner*

v.

GEORGE H. CLEAVER - - - - *Respondent*

SUPPLEMENTAL BRIEF FOR PETITIONER, WITH APPENDIX, TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner's supplemental brief to the pending petition for writ of certiorari herein is presented under authority of Rule 22.6 of this court. It calls to this court's attention two after-decided cases of the United States Court of Appeals for the Sixth Circuit, *Lucey* v. *Seabold,* No. 79-3752, and *Gilbert* v. *Sowders,* No. 79-3597, both decided April 2, 1981. Appendix, pp. 7-8, 9-17.

Both of these after-decided cases substantially undermine and seriously question the Sixth Circuit's opinion in *Cleaver* v. *Bordenkircher,* 634 F. 2d 1010 (1980). *Cleaver* forms the basis of decision in the within case of *Sowders* v. *Cleaver,* in which a writ of certiorari is being sought.

Cleaver's primary rationale, by its own statement, is equal protection. It claims in the following language

that Kentucky courts dismiss appeals of unmonied appellants while at the same time hearing and adjudicating claims of monied appellants:

> The Kentucky Court of Appeals denied this motion for an additional extension. It also dismissed the appeal. When counsel went back to the trial court and sought and received an order reinstating the appeal, the Supreme Court held a hearing and decided that the trial court had no authority to readjudicate a procedural issue already decided by the highest court of the state. It again dismissed the appeal.
>
> While there is no doubt as to the validity of this last ruling, *the net result of the entire procedure is that the record shows, without dispute, that appellee Cleaver was denied counsel to process his appeal, while other persons in Kentucky convicted of crimes who had the financial means to do so would have been able to perfect their appeals and receive adjudication of them by the highest court in the state.* (emphasis added).

In *Lucey* and *Gilbert,* however, the Sixth Circuit Court absolutely contradicts its own assertion in *Cleaver. Lucey* and *Gilbert,* at Appendix, pp. 7, 9, state matter-of-factly that both counsel therein whose procedural default led to dismissal of the appeals were *retained.* Both cases, then, conclusively show that the Sixth Circuit in *Cleaver* erred in saying that Kentucky courts condone a double standard of dismissing or not dismissing appeals, based solely upon financial means.

Accordingly, *Cleaver's* equal protection rationale has been confounded by its own authors. *Cleaver* was

decided by the same three judges of the Sixth Circuit who decided *Lucey* and *Gilbert*. All these cases were argued before those same judges on the same day, April 4, 1980. *Cleaver* was decided October 31, 1980. *Lucey* and *Gilbert* were decided more than five months later by the same judges, or almost exactly one year after oral argument in all those cases.

Lucey and *Gilbert* show that Kentucky appellate courts, without distinction, dismiss appeals of appellants who have either appointed or retained counsel. Violation of Kentucky's neutral procedural rules, upon which Kentucky's limited appeal procedure is conditioned, is the only test for dismissal. Who violates the appellate rules is of no matter. Thus, *Lucey* and *Gilbert* show that the *Cleaver* equal protection rationale is based upon an absolutely erroneous statement of Kentucky appellate court custom and practice.

CONCLUSION

Petitioner submits that the described after-decided cases of the Sixth Circuit abundantly show the error of the court's *Cleaver* opinion, and submits that these cases are additional strong evidence that this court should grant the writ of certiorari and resolve the Constitutional .question presented in the petition herein.

Respectfully submitted,

STEVEN L. BESHEAR
Attorney General

J. GERALD HENRY
Assistant Attorney General
Counsel of Record
Capitol Building
Frankfort, Kentucky 40601
Telephone: (502) 564-4044
Counsel for Petitioner

PROOF OF SERVICE

I, J. Gerald Henry, counsel of record for petitioner, hereby certify that three (3) copies of the foregoing Supplemental Brief for Petitioner, With Appendix, To Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit were mailed by United States mail, with first class postage prepaid, to Mr. Jack Emory Farley, Mr. William M. Radigan, J. Vincent Aprile II, Office of the Public Advocacy, State Office Building Annex, Frankfort, Kentucky 40601, counsel for respondent, and that all parties required to be served have been served, all on this April ____, 1981.

J. Gerald Henry
Assistant Attorney General
Counsel of Record for Petitioner

APPENDIX

No. 79-3752

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KEITH E. LUCEY - - - - *Petitioner-Appellee,*

v.

WILLIAM SEABOLD, Superintendent, Blackburn Correctional Complex, - *Respondent-Appellant.*

Appeal from the United States District Court for the Eastern District of Kentucky.

Decided and Filed April 2, 1981.

Before: EDWARDS, Chief Judge, ENGEL and JONES, Circuit Judges.

The Court delivered a PER CURIAM opinion. JONES, Circuit Judge (p. 3), delivered a separate dissenting opinion.

PER CURIAM. This is an appeal from the United States District Court for the Eastern District of Kentucky which entered a writ of habeas corpus on petition of appellee Lucey who claimed deprivation of his right to effective assistance of appellate counsel.

The facts in this case show that Lucey's retained counsel had perfected his appeal and had filed the necessary record and briefs but the Court of Appeals of Kentucky had dismissed his appeal because he had failed to follow the requirement of Kentucky Rule of Appellate Procedure 1.095

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(a)(1) which includes the requirement that the pleadings in the Court of Appeals must contain "[t]he same information as required in a statement of appeal in the Supreme Court pursuant to RAP 1.090."

There is no question, of course, but that the Court of Appeals has a perfect right to demand that such a document be prepared and filed. Two questions, however, might be considered as arising: 1) whether Lucey's lawyer had been guilty of ineffective assistance of counsel within our *Beasley* v. *United States,* 491 F. 2d 687 (6th Cir. 1974), rule and 2) whether the case should be remanded to the District Court to take testimony on the question of whether, as claimed by appellee Lucey, the dismissal of his appeal violated equal protection since no such action had been taken on any other case under similar facts.

Study of this record convinces this court that this case should be remanded to determine the equal protection issue set forth immediately above.

This case is ordered remanded for such purpose with power to take any needed testimony.

JONES, Circuit Judge, dissenting. It is an important duty of counsel to ensure that his client has an opportunity to present his claims at an appeal of right. Appellate counsel's failure to comply with Kentucky's Rule of Appellate Procedure 1.095(a)(1), causing the dismissal of the appeal without a consideration of the merits, is *ineffective* assistance of counsel violative of due process. *Gilbert* v. *Sowders,* No. 79-3597 (6th Cir. April 2, 1981) (per curiam) (Jones, concurring. *See also Anders* v. *California,* 386 U. S. 745 (1967); *Benoit* v. *Wingo,* 423 F. 2d 880, 883 (6th Cir. 1970). Consequently, I would affirm the judgment of the district court granting Seabold's petition for writ of habeas corpus.

No. 79-3597

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DANIEL DUANE GILBERT, - - *Petitioner-Appellee,*

v.

DEWEY SOWDERS, Superintendent, Kentucky State Penitentiary, - *Respondent-Appellant.*

Appeal from the United States District Court for the Western District of Kentucky.

Decided and Filed April 2, 1981.

Before: EDWARDS, Chief Judge, ENGEL and JONES, Circuit Judges.

The Court delivered a PER CURIAM opinion. JONES, Circuit Judge, (pp. 3-8) delivered a separate concurring opinion.

PER CURIAM. In this case Warden Sowders appeals from a District Judge's decision granting defendant Gilbert's petition for writ of habeas corpus after the District Court determined that he had been denied his constitutional right to effective assistance of counsel during the appeal of his Kentucky conviction for kidnapping.

This proceeding arises from a situation where retained counsel violated a highly technical procedural rule which resulted in Gilbert's case being dismissed.

Counsel had performed every requirement of the Kentucky appellate rules, except one. He had petitioned for an extension of 60 days for filing the record on appeal while there was time for the extension to be granted. The rules allowed such a 60-day extension. Actually, the extension had been granted by the order, but had not been entered by the clerk of court. Gilbert's counsel's[1] technical violation was that he failed to insure that the order was timely entered as is required by the Kentucky case law.

Kentucky has, of course, a right to enforce its own rules of procedure, including the unusual requirement that the lawyer see to it that the clerk performs his public obligation.

We cannot, however, avoid the conclusion that the failure of the Kentucky Supreme Court to grant appellant's counsel's motions for reconsideration of the dismissal of the appeal was arbitrary and carpicious, and an abuse of due process of law, as protected by the United States Constitution. By these motions the Supreme Court had been fully advised as to the obviously sincere attempt to perfect an appeal and the miniscule nature of the defect. Appellant had been sentenced to sentences totaling 105 years. Kentucky's Constitution grants such a person a direct appeal to the Supreme Court of Kentucky. Ky. Const. § 110 (2)(b).

The judgment of the District Court granting the writ is affirmed.

JONES, Circuit Judge, concurring. I concur in the judgment that Kentucky's incarceration of Daniel Duane Gilbert violates the United States Constitution. I write separately

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[1]Gilbert's counsel at this juncture was the attorney who had been retained for his trial and who undertook the Kentucky Supreme Court appeal without compensation. His counsel on this federal appeal is Kentucky's public defender.

because I believe that the majority misconceives the issue presented by this case.

I

Gilbert was convicted of attempted kidnapping, wanton endangerment in the first degree, two counts of first-degree robbery, kidnapping and first-degree rape. On December 2, 1976, he was sentenced to 105 years imprisonment. A notice of appeal was filed on December 10, 1976. Gilbert, an indigent, was appealing *in forma pauperis* with the volunteer assistance of trial counsel.

Kentucky's rules of procedure require that the record on appeal be filed within sixty days of the filing of the notice of appeal, unless the trial court by order extends the time an additional sixty days.[1] Though the clerk of the trial court and the court reporter actually prepare the transcript

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[1] "Rule CR 73.08 Filing Record on Appeal

The record on appeal as provided in Rules 75 and 76 shall be filed with the appellate court within 60 days after the date of filing the notice of appeal except that when more than one appeal is taken from the same judgment the trial court may prescribe the time for filing, which in no event shall be less than 60 days after the date of filing the first notice of appeal. In all cases the trial court in its descretion and with or without motion or notice may extend the time for filing the record on appeal, if its order for extension is made before the expiration of the period for filing as originally prescribed or as extended by a previous order, but the trial court shall not extend the time to a day more than 120 days after the date of filing the first notice of appeal. The appellate court in its discretion may upon proper motion and a showing of good cause extend the time for filing the record on appeal if the motion for extension is made before the expiration of the period for filing as originally prescribed or as extended by a previous order." (Effective July 1, 1976.)

of record and of evidence[2], respectively, Gilbert's appellate counsel has the responsibility to file the record.[3] When it became obvious that the trial court clerk could not prepare and transmit the record to the appellate court by February 8, 1977, Gilbert's appellate counsel filed a motion and order for an extension. This motion for an extension of time was filed on February 4, 1977, before the expiration of the initial sixty-day period as required by Rule CR 73-08. However, the order of the trial court granting the extension of time for filing the record on appeal was not timely dock-

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[2]"Rule 75.07 Record to be Prepared and Transmitted by Clerk

(1) The clerk of the trial court shall prepare and certify the entire record on file in his office, other than depositions not read in evidence, in accordance with the requirements of RAP 1.110 to 1.120. Such original record shall include the designations or stipulations of the parties as to evidence and proceedings stenographically reported and any statement by the appellant of the points on which he intends to rely. A certified copy of the civil docket assigned to the action may be provided in lieu of the original.

(2) The transcript or parts thereof filed as provided in Rule 75.02 shall be certified by the clerk as a part of the record on appeal.

(3) An original exhibit, when designated, shall be certified by the clerk as part of the record on appeal, but physical exhibits other than documents shall not be transmitted to the appellate court unless requested on its own motion or on the motion of any party.

(4) The matter certified under the provisions of subsections (1), (2) and (3) of this Rule shall constitute the record on appeal and shall be transmitted by the clerk to the appellate court. It is the responsibility of the appellant to cause the record to be filed within the time specified."

[3]"Rule 1.070 Perfecting Appeals

(a) To perfect an appeal the appellant shall:

(1) Cause the record on appeal to be filed."

(Effective July 1, 1976.)

eted, even though lodged by counsel with the clerk.[4] On February 22, 1977, the trial court entered a *nunc pro tunc* order extending the deadline for filing the record. The record was filed on March 21, 1977.

On April 19, 1977, the state moved for dismissal of Gilbert's appeal because the trial court's order extending the filing deadline was void. Thus, the state argued that the record on appeal was untimely filed. The Kentucky Supreme Court dismissed Gilbert's appeal on May 18, 1977. A motion to reconsider was denied.

Gilbert filed a motion in the trial court to reinstate his appeal. On February 2, 1978, his motion was granted. Gilbert refiled his notice of appeal and both sides thoroughly briefed the case. Again, the Kentucky Supreme Court dismissed the appeal and Gilbert's motion for reconsideration was denied.

Thereafter, Gilbert filed a petition for writ of habeas corpus in the Western District of Kentucky. He alleged that his appellate counsel's failure to comply with Kentucky's rules of appellate procedure, causing the dismissal of his appeal, violated his right to effective assistance of counsel. The district court granted the writ. Kentucky appeals.

II

Gilbert's appellate counsel's motion for an extension of time was timely filed. However, by February 8, 1977, the last day on which to receive an extension, an order grant-

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[4]In Gilbert's appellate brief it is stated that counsel may have failed to have the order granting the extension signed by the Jefferson Circuit Court judge. However, the district court stated that Gilbert's counsel failed to ensure that the order was properly docketed by the clerk of courts. In my view, either fact denies Gilbert of his right of effective assistance of counsel.

ing such had not been docketed. Under Kentucky law, a court's order is effective only after it has been signed by the judge and noted in the docket by the clerk. *Commonwealth of Kentucky* v. *Greer Brothers and Young*, 548 S. W. 2d 167 (Ky. App. 1977); *Murrell* v. *City of Hurstbourne Acres*, 401 S. W. 2d 60 (Ky. App. 1966). Thus, appellate counsel's failure to ensure that the clerk performed his duty to docket the order granting the extension resulted in the dismissal of Gilbert's appeal. Gilbert's appeal was dismissed pursuant to Kentucky's rules of procedure.

The majority's opinion holds that "Kentucky has a right to enforce its own procedural rules." However, the majority's opinion also holds that it is "arbitrary and capricious" for the Kentucky Supreme Court to deny Gilbert's motion for reconsideration. In my view, the denial of Gilbert's motion to reconsider is "arbitrary and capricious" only if it "did not have a real and substantial relation to the ends sought to be attained." *Isaac* v. *Engle*, No. 78-3488 (6th Cir. December 12, 1980) (en banc) (Jones, concurring). If, as stated by the majority, "Kentucky has a right to enforce its own procedural rules," thereby dismissing Gilbert's appeal, then Kentucky also has a right to deny motions to reconsider the dismissal. The denial of the motion to reconsider makes final the dismissal. To label appellate counsel's failure to comply with Kenutcky's rules of procedure as "miniscule" does not alter this conclusion. For these reasons, I would resolve this case as it was presented in the briefs and at oral argument.

III

It is well settled that Gilbert, an indigent, cannot be denied assistance of counsel on an appeal of right. *Ross* v. *Moffitt*, 417 U. S. 600 (1974); *Douglas* v. *California*, 372 U. S. 353 (1962). Thus, the questions to be decided are:

(1) whether appellate counsel must render Gilbert *effective* assistance; and (2) whether counsel's failure to obtain an extension of time causing the dismissal of Gilbert's appeal is ineffective assistance of counsel.

A trial counsel's obligations are well established. The plain language of the Sixth Amendment requires that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have assistance of counsel for his defense." This command of the Constitution has been interpreted to mean *effective* assistance of counsel. *Glasser* v. *United States,* 315 U. S. 60 (1942). *Effective* assistance of counsel during criminal prosecutions is also "within the intendment of the due process of law clause" of the Fourteenth Amendment, *Powell* v. *Alabama,* 287 U. S. 53, 66 (1932); *Reece* v. *Georgia,* 350 U. S. 85, 89-90 (1955). The reasons trial counsel must render *effective* assistance are not difficult to fathom. As aptly stated by Justice Rehnquist:

> The purpose of the trial stage from the state's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the state employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant, argues rulings of the court and makes direct arguments to the court and jury seeking to persuade them of the defendant's guilt.

Ross, 417 U.S. at 610. The assistance of counsel required under the Fourteenth Amendment is "counsel reasonably likely to render and rendering reasonably effective assistance," *Beasley* v. *United States,* 491 F. 2d 687, 689 (6th Cir. 1974). If a trial attorney improperly exercises his discretion, the assistance of counsel rendered is constitutionally defective. Thus, an attorney must investigate all apparently substantial defenses, advise his client properly

on clear points of law, and develop strategy and tactics which lawyers of ordinary training and skill consider competent. *Id. See also, Michel* v. *Louisiana,* 350 U. S. 91, 101 n. 7 (1950). "Basic procedural errors are also considered in determining whether assistance of counsel has been constitutionally adequate." *Beasley,* 491 F. 2d at 693. Most significantly, *Beasley* holds that trial counsel "*must* assert defenses in a proper and timely manner." *Id.* at 696 (emphasis added).

Both reason *and* precedent require that the right to *effective* counsel extend to appeals of right. Though "there are significant differences between the trial and appellate stages of a criminal proceeding." *Ross,* 417 U. S. at 610, appellate review has become an integral part of the system for finally adjudicating the guilt or innocence of a defendant. *Griffin* v. *Illinois,* 351 U. S. 12, 18 (1956). In an appeal of right, the critical issue is "whether there has been a correct adjudication of guilt in every case." *Ross,* 417 U. S. at 615. Effective appellate counsel is necessary if appellate courts are to perform their assigned function. Therefore, the *Beasley* standard that counsel render reasonably effective assistance is applicable on appeals of right, *Benoit* v. *Wingo,* 423 F. 2d 880, 883 (6th Cir. 1970); *See also, Anders* v. *California,* 386 U. S. 738, 745 (1967). To hold otherwise would undermine the well-recognized purpose to granting, albeit gratuitously, an appeal of right.

It is well settled in this Circuit that trial counsel's failure *to perfect* an appeal is a denial of due process. *Boyd* v. *Cowan,* 519 F. 2d 182 (6th Cir. 1975); *Woodall* v. *Neal,* 442 F. 2d (sic) (6th Cir. 1971). Similarly, appellate counsel's failure to perform procedural duties necessary to *prosecute* an appeal is a denial of due process. *See, Benoit, supra.* Thus, appellate counsel's failure to obtain an extension of time to file a record on appeal denied Gilbert due process of law. Such a ruling will not have an unduly

burdensome effect on the administration of state appellate courts. Private as well as professional disciplinary procedures are effective tools to police repetitive attorney misconduct. Nor does such a ruling provide appellants any incentive to encourage less than full compliance with procedural rules to perfect appeals. The writ of habeas corpus is granted only if the state appellate court decides not to hear the appeal.

The harmless error rule is not applicable where a denial of effective assistance of counsel is found. *Beasley*, 491 F. 2d at 696. *Compare, McKeldin* v. *Rose*. No. 80-1198 (6th Cir. October 8, 1980) (per curiam). Consequently, the merits of Gilbert's state appeal of right need not be examined.

For the above stated reasons I concur in the judgment AFFIRMING the district court.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RECEIVED
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SUPREME COURT, U.S.

NO. 80-1278

DEWEY SOWDERS, WARDEN, Petitioner

v.

GEORGE H. CLEAVER, Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

William W. Radigan

WILLIAM M. RADIGAN
ASSISTANT PUBLIC DEFENDER
THIRD FLOOR
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

J. Vincent Aprile II

J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC ADVOCATE
THIRD FLOOR
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

CO-COUNSEL FOR RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-1278

DEWEY SOWDERS, WARDEN, Petitioner

v.

GEORGE H. CLEAVER, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

WHETHER, UNDER THE FACTS AND CIRCUMSTANCES OF HIS CASE, THE RESPONDENT WAS DENIED HIS RIGHT TO EQUAL PROTECTION OF LAW AND HIS DUE PROCESS RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN HIS APPOINTED APPELLATE COUNSEL FAILED TO FILE A TIMELY BRIEF BEFORE THE SUPREME COURT OF KENTUCKY WITH THE RESULT THAT THE RESPONDENT'S DIRECT APPEAL FROM HIS CONVICTION WAS DISMISSED?

COUNTERSTATEMENT OF THE CASE

Contrary to his plea, the respondent was found guilty by the jury in the Johnson Circuit Court, Kentucky, on one count of murder and one count of robbery in the first degree (Trial Transcript of Record, hereinafter designated T.T.R., pp. 71-73). The respondent was sentenced to life imprisonment on the murder charge and to twenty (20) years imprisonment on the robbery charge (T.T.R., p. 72). Final judgment was entered by the Johnson Circuit Court on February 5, 1976 (T.R., pp. 74-75), and the Notice of Appeal was filed on the same day (T.T.R., p. 76).

After an extensive delay in the preparation of the transcript of evidence, the respondent's Statement of Appeal and record on appeal were filed on January 19, 1977, with the Supreme Court of Kentucky (Appendix to Brief for Respondent-Appellant before Sixth Circuit, hereinafter designated App. S.C., pp. 20-22).

On February 28, 1977, the respondent, by assigned appellate counsel, William M. Radigan, filed a timely motion requesting an extension of thirty (30) days in which to file the brief on appeal, to and including March 30, 1977 (App. S.C., pp. 26-28). The respondent made this motion pursuant to Kentucky Rule of Appellate Procedure (herinafter designated RAP) 1.230 and 1.450(a).[1] As grounds for this motion, the respondent stated, inter alia:

> Since the filing of the record on appeal, the undersigned counsel has had numerous pleadings which have been filed within the required period of time, including appellate briefs filed on January 21, February 1, February 2, (two briefs), February 21, and February 24, 1977 (App.S.C., p. 26).

On the same day, the respondent filed a Motion with the Supreme Court of Kentucky requesting permission to file a supplemental transcript of record (App.S.C., pp. 23-25). This supplemental record consisted of the transcript of the voir dire of the jury

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[1] Now, Kentucky Rule of Civil Procedure (CR) 76.12(2)(b) and CR 76.40.

at respondent's trial. The official court reporter for the Johnson Circuit Court had been unable to complete that portion at the time the original record was filed (App.S.C., pp. 23-25).

In a letter dated March 15, 1977, the Clerk of the Supreme Court informed respondent's appellate counsel that an extension to and including March 30, 1977, had been granted "as a FINAL extension", and that the supplemental record was ordered docketed as of March 15, 1977 (App.S.C., p. 29).

On March 30, 1977, respondent filed a motion requesting an additional extension of thirty (30) days in which to file his brief on appeal (App.S.C., pp. 30-32). Once again, respondent's counsel explained to the Supreme Court of Kentucky that his case-load mandated the requested additional time:

> During the next ten (10) days, the undersigned counsel has seven (7) appellate briefs which are scheduled to be filed with this Court and the Court of Appeals. In an attempt to complete as many of these pleadings as possible, the undersigned counsel has been forced to devote a majority of his available time to completing other cases to the detriment of appellant's appeal. The requested additional time is required to allow the undersigned counsel to devote the time to appellant's case which is necessarily required by its complexity and length (App.S.C., p. 30).

Respondent's counsel then explained the dilemna in which he found himself:

> Under Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967), appointed counsel's "role as advocate requires that he support his client's appeal to the best of his ability." Under our adversary system, it has become a well-established principle that there is no substitute for counsel who acts as an advocate and who makes the best arguments he can on the facts and the law. High v. Rhay, 519 F.2d 109, 113 (9th Cir. 1975), citing Anders v. California, supra. Accordingly, when an appointed counsel in a criminal appeal because of his total volume of work is unable to devote sufficient time to complete a professionally competent appellate brief within the allotted time period, his only recourse is to seek an extension of time from the appellate court. If the appointed counsel declines to request an extension and instead files a perfunctory brief, the indigent appellant is denied the effective assistance of counsel on appeal, a right which he is guaranteed by the Sixth Amendment (App.S.C., p. 31).

In an order entered on April 20, 1977, the Supreme

Court of Kentucky denied the requested extension of time (App., p. 33).

On July 29, 1977, respondent's appellate counsel filed a Motion For Enlargement of Time for Filing Brief on Appeal or, In the Alternative, Motion for Clarification Of the Status Of Appellant's Appeal with the Supreme Court of Kentucky (App.S.C., pp. 34-47). At the same time, the respondent tendered a Brief for Appellant to the Clerk of the Supreme Court (App., p. 36). This brief was thirty-five (35) pages in length and presented five (5) assignments of error. The issues presented to the Supreme Court of Kentucky as the basis for the reversal of the respondent's conviction were as follows:

I.

DID THE TRIAL COURT ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE BY OVERRULING APPELLANT'S MOTION TO DISMISS THE JURY ON THE BASIS THAT THE JURY WAS EXPOSED TO THE FACT THAT APPELLANT WAS SHACKLED?

II.

WAS THE TRIAL COURT'S USE OF OUT-OF-COURT REPORTS BY TWO EXAMINING PHYSICIANS TO DETERMINE THE APPELLANT'S COMPETENCY TO STAND TRIAL A DENIAL OF THE APPELLANT'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT?

III.

DID THE COURT BELOW ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE AND DENY THE APPELLANT HIS CONSTITUTIONAL RIGHT TO PRESENT EVIDENCE IN HIS BEHALF WHEN CERTAIN TESTIMONY AS TO APPELLANT'S MENTAL CONDITION WAS RULED INADMISSIBLE?

IV.

DID THE COURT BELOW ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE BY SUBMITTING AN INSTRUCTION TO THE JURY, OVER APPELLANT'S OBJECTION, ON UNINTENTIONAL MURDER WHEN SUCH AN INSTRUCTION WAS NOT SUPPORTED BY THE EVIDENCE?

V.

DID THE COURT BELOW ERR TO APPELLANT'S SUBSTANTIAL PREJUDICE BY REFUSING THE APPELLANT'S TENDERED INSTRUCTION AS TO THE EFFECTS OF A VERDICT OF NOT GUILTY BY REASON OF INSANITY?

In his Motion, respondent's counsel initially explained the reason for the long delay in preparing the brief:

> At first glance, it may seem that the appellant's requested enlargment of one hundred and twenty-one (121) days reveals that the undersigned counsel was dilatory in his attempt to complete the appellant's brief. However, this is not the case at all. Once this Court revealed, through its April 20, 1977, Order, its general policy of denying additional motions for extensions of time, the undersigned counsel was forced to complete as many appellate pleadings as possible within the requisite time. Consequently, the undersigned counsel has been forced to defer work on the appellant's case since March 30, 1977, while completing briefs for his numerous other clients within the scheduled time. As evidence of this predicament, it should be noted that since March 30, 1977, the undersigned counsel has filed some twenty-three (23) timely appellate briefs with this Court and the Court of Appeals (App.S.C., p. 37).

In examining the requested enlargement of time, the respondent's appellate counsel presented five points of analysis: (1) The failure of the appellate counsel to file the brief within the allotted time was the result of excusable neglect (App.S.C., pp. 37-39; (2) Ethical considerations mandated that the respondent's counsel request two extensions of time for filing respondent's brief - the second of which was denied by the Court (App.S.c., pp. 39, 41-42); (3) The respondent's constitutional right to effective assistance of counsel on appeal obligated his appellate counsel to request the two extensions of time (App.S.C., pp. 39-41); (4) The respondent's counsel submitted that it was improper for an appellate court to penalize the respondent for the failure of his counsel to file a timely brief (App., S.C. pp. 41-44); and (5) The failure of the Supreme Court to grant the requested enlargement of time constitutes a denial of respondent's constitutional right to be represented by appellate counsel and his right to present a brief in support of his challenge to his conviction (App.S.C., pp. 44-45).

In discussing the request for clarification, the respondent's counsel noted: (1) The Rules of Appellate Procedure

include the provision that an appeal may be dismissed for an appellant's failure to file a brief. However, this penalty is clearly discretionary, not mandatory (App.S.C., pp. 44-45); (2) If his appeal is dismissed, then the respondent would be denied his constitutional right to effective assistance of counsel on appeal (App.S.C., pp. 45-46); and (3) The procedural requirements of the Supreme Court are outweighed by the respondent's constitutional rights on appeal (App.S.C., pp. 46-47).

On August 11, 1977, the Commonwealth filed their Response to Motion for Enlargement of Time (App.S.C., pp. 48-51). Additionally, on the same day, a Motion to Dismiss Appeal on the basis of the respondent's failure to timely file his brief was filed with the Supreme Court of Kentucky (App.S.C., pp. 52-53).

In an Order entered on September 13, 1977, the Supreme Court of Kentucky denied the respondent's request for an enlargement of time, and, furthermore, dismissed the respondent's appeal (App.S.C., p. 54).

On September 19, 1977, respondent's appellate counsel filed a Motion for Reconsideration En Banc (App.S.C., pp. 55-59). The respondent, inter alia, examined the ramifications of the Order of September 13, 1977:

> The net effect of this Order is threefold:
>
> a) Contrary to Section 115 of the Kentucky Constitution, the appellant has been denied his right to "at least one appeal to another court."
>
> b) Even though the requisite appellate pleadings have been tendered to this Court, the appellant is not allowed to have his arguments considered on their merits. This result has occurred solely because he was represented by the Office of Public Defender whose mandated caseload precluded the undersigned counsel from complying with the procedural rules of this Court.
>
> c) Finally, this Court by its Order has recognized that the appellant has been denied his right to the effective assistance of counsel on appeal. Such a result is constitutionally impermissible. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967); Macon v. Lash, 458 F.2d 942 (7th Cir. 1972); Blanchard v. Brewer, 429 F.2d 89 (8th Cir. 1970); Shipman v. Gladden, Or., 453 P.2d 921 (1969); People v. Brown, 235 N.E.2d 562 (Ill. 1968) (App.S.C., pp. 56-57).

The Commonwealth filed its Response on September 26, 1977 (App.S.C., pp. 60-62). In an Order entered on October 5, 1977, the Supreme Court, without any comment, denied the motion for reconsideration (App.S.C., p. 63).

Following the denial of the reconsideration, Hon. James Early, respondent's trial counsel, approached the Johnson Circuit Court in an attempt to have the respondent's appeal reinstated. In an Order signed on October 25, 1977, Judge W. B. Hazelrigg reinstated respondent's right to appeal "because of his appellate counsel's ineffective assistance" (App.S.C., p. 64).

Subsequently, on November 30, 1977, the respondent's case was filed with the Clerk of the Supreme Court of Kentucky (App.S.C., pp. 65-66, 70). At this same time, respondent's appellate counsel requested leave to submit the case on the briefs which had been tendered to the Supreme Court on July 29, 1977 (App.S.C., pp. 67-69). On January 5, 1978, the Supreme Court granted the requested relief (App.S.C., p. 73).

On January 19, 1978, the Commonwealth filed a Motion to Dismiss Appeal on the ground that "the trial court did not have jurisdiction either inherently or by statute" to reinstate respondent's appeal (App.S.C., pp. 75-77). On February 2, 1978, the counsel for the Commonwealth filed a second Motion to Dismiss (App.S.C., pp. 82-85). The respondent, through his appellate counsel, extensively replied to both these motions (App.S.C., pp. 78-81, 86-88). In an Order dated February 15, 1978, the Supreme Court denied all of the Commonwealth's motions (App. S.C., p. 89).

However, at the oral argument in the respondent's case, the Supreme Court sua sponte "reconsidered the motions to dismiss" (App.S.C., p. 89). After reviewing the factual background of his case, the Supreme Court of Kentucky in a published opinion dismissed the respondent's appeal for the second time for two reasons: (1) That the reinstatement of respondent's appeal by the trial court "was in effect an appeal to the Johnson Circuit Court to adjudicate an issue when that same issue already has been disposed of" in the Supreme Court of Kentucky (App.S.C., p. 93); (2) That "RCr 11.42 does not confer jurisdiction on a circuit court to reinstate a right of appeal"

(App.S.C., p. 94). See: Cleaver v. Commonwealth, Ky., 569 S.W.2d 166 (1978).

On October 13, 1978, the respondent filed his petition for a writ of habeas corpus with a supporting memorandum in the District Court (App.S.C., pp. 1-16). In essence, the respondent alleged that he was denied his right to appeal through the ineffective assistance of his assigned appellate counsel. The Commonwealth's answer was filed on November 22, 1978 (App.S.C., pp. 97-124).

In a Memorandum Opinion filed on May 30, 1979, the District Judge concluded that respondent's assigned counsel on appeal had rendered ineffective assistance of counsel by failing to file respondent's brief on appeal within the time prescribed by the Supreme Court of Kentucky (App.S.C., pp. 133-139). The Commonwealth filed its Notice of Appeal on June 28, 1979 (App.S.C., p. 141).

In his pleadings before the Sixth Circuit, the petitioner argued not only that there was no constitutional right to the effective assistance of appellate counsel, but also that the respondent was not denied his rights under the Equal Protection Clause of the Fourteenth Amendment:

> It is the appellant's argument that the dismissal of an appeal as the result of procedural default does not constitute invidious discrimination. Accordingly, the appellant further argues that Equal Protection was not violated and, therefore, does not give the petitioner a federal right to have his appeal reinstated (Brief for Respondent-Appellant, p. 14).

See also: Brief for Respondent-Appellant at pp. 17-18, 20, 48, 50. Consequently, the respondent's arguments before the court below was couched in both due process and equal protection terms.

In an Opinion rendered on October 31, 1980, the Sixth Circuit affirmed the issuance of a conditional writ of habeas corpus. Cleaver v. Bordenkircher, 634 F.2d 1010 (6th Cir. 1980). In so doing, the Sixth Circuit concluded that the respondent was denied his right to equal protection of law:

> [Respondent] has been deprived of his right to appeal his conviction solely because his indigency status made the overburdened public defender his only source of legal representation. Id., at 1012.

As an alternative basis for its Opinion, the Sixth Circuit adopted the rationale of the District Judge that the respondent was denied his right to effective assistance of appellate counsel. Id., at 1012.

REASONS FOR DENYING THE WRIT

I.

CONTRARY TO THE SUGGESTION OF THE PETITION, THE CONCLUSION OF THE SIXTH CIRCUIT THAT THE RESPONDENT WAS DENIED HIS DUE PROCESS RIGHT TO THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WAS BASED UPON SUBSTANTIAL AND CONTROLLING LEGAL PRECEDENT.

Throughout his pleadings before this Court, the petitioner has consistently argued that "there can be no Constitutional right to effective assistance of appellate counsel on appeal. . ." Petition, at p. 14. The respondent submits a review of decisions of this Court, the lower federal courts, and the various state courts reveals that due process of law and fundamental fairness mandate the effective assistance of appellate counsel.

a - The Supreme Court

During the past twenty (20) years, this Court has given extensive consideration to the rights of indigents on appeal. In Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), the Court examined an Illinois rule which allowed appellate review of a criminal conviction only if the defendant paid for the trial transcript. As a result, an indigent who could not afford the cost of obtaining the transcript was precluded from obtaining appellate review of his conviction. Four justices concluded that this procedure violated both the due process clause and the equal protection clause of the Fourteenth Amendment. Mr. Justice Frankfurter, who cast the deciding vote, concluded that the Illinois procedure violated the equal protection clause. Id., 76 S.Ct. at 592.

In Smith v. Bennett, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961), Iowa required a filing fee in order to file a state habeas petition, and in Burns v. Ohio, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959), the Supreme Court of Ohio Required a $20.00 filing fee for leave to appeal a judgment to the Ohio Court of Appeals. Each of these state-imposed financial barriers to an appeal was held to violate the Fourteenth Amendment.

Similarly, the Court invalidated a number of barriers to access to a transcript for appellate purposes. For example, Lane v. Brown, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892 (1963), involved an Indiana statute providing that only the public defender could obtain a free transcript. In Draper v. Washington, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963), and indigent could obtain a free transcript only if he convinced the trial judge that the appeal was not frivolous. Such screening devices were likewise held violative of the Fourteenth Amendment.

In Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), the Court expanded its review of appellate process to examine whether an indigent's access to an appellate system was adequate. In concluding that a state must provide counsel for the indigent on his first appeal as of right, the Court relied upon both the due process clause and the equal protection clause of the Fourteenth Amendment:

> But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an "invidious discrimination."
>
> When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure. Id., 83 S.Ct. at 816; (emphasis added).

Contrary to the extensive argument presented by the petitioner to this Court, both clauses of the Fourteenth Amendment apply to an examination of an indigent's access to an appellate system. If there was any question on this matter, it was resolved by the decision in Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). Mr. Justice Relinquist explained:

> The precise rationale for the Griffin and Douglas lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that amendment. Neither Clause by itself provides an entirely satisfactory basis for the result reached, each depending on a different inquiry which emphasizes different factors. "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. Id., 94 S.Ct. at 2443; (emphasis added).

It is precisely because of the due process clause that this Court has made it clear that an indigent's appellate counsel cannot abandon his appeal in midstream. Entsminger v. Iowa, 386 U.S. 748, 87 S.Ct. 1402, 1402, 18 L.Ed.2d 501 (1967), ("Here there is no question but that petitioner was precluded from obtaining a complete and effective appellate review of his conviction. . .").

In Anders v. California, 836 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), the Court made it unmistakably clear that an indigent's appellate counsel must provide a minimum level of competent representation. The Court required, as a matter of federal constitutional law, that the indigent receive "that advocacy which a nonindigent defendant is able to obtain." Id., 87 S.Ct. at 1400. The reasoning for this Court's requirement of an "active advocate" on appeal is conclusive as to the issue as to whether an indigent is entitled to effective assistance of appointed counsel:

> Moreover, such handling would intend to protect counsel from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled. Id., 87 S.Ct. at 1400; (emphasis added).

As the Seventh Circuit stated in Nickels v. Gagnon, 454 F.2d 467, 471 (7th Cir. 1971):

> The Anders opinion requires appointed counsel to represent his client effectively. . .and to demonstrate in writing that he has discharged his professional responsibilities. (emphasis added).

b - The Lower Federal Courts

The lower federal courts are unanimous in holding that the critical error of court-appointed counsel cannot serve to deny his client's right to appeal. In Macon v. Lash, 458 F.2d 942 (7th Cir. 1972), in an opinion by Mr. Justice Stevens (then Circuit Judge), the petitioner claimed that the incompetence of court-appointed counsel denied his right to appeal. In Macon, counsel filed a futile motion for extension of time instead of a timely motion for a new trial. As a result, Mr. Macon lost his right to appeal his conviction for murder. Speaking in words remarkably appropirate to the case at bar, Mr. Justice Stevens stated:

> With due respect for the views of the Indiana Supreme Court, we are persuaded that petitioner's federal claim has merit. The Federal Constitution contains no requirement that a defendant be given appellate review of his conviction, but if such review is provided, appellate procedures and their availability to the indigent must satisfy the Fourteenth Amendment's basic standards of fairness. Since the Supreme Court has held that those standards require the states to waive even nominal filing fees, to provide free transcripts, to appoint counsel, and to refuse to dismiss meritless appeals that have not been adequately evaluated by appellate counsel, we believe it is equally clear that petitioner's right to appeal could not be forfeited by the critical error of inexperienced court-appointed counsel disclosed by this record. Id., at 949-950; (emphasis added; footnotes omitted).

In Benoit v. Wingo, 423 F.2d 880 (6th Cir. 1970), the Sixth Circuit examined a factual circumstance remarkably similar to the case at bar. In the cited case, the appellant's court-appointed attorney filed a timely notice of appeal and obtained an extension of time for perfecting the appeal. Id., at 881. The attorney then wrote the appellant a letter informing him that the appeal "would be wasting our time" and refusing to continue with the appeal. Id., at 881-882. The Court, in analyzing the appellant's situation, stated:

> Counsel in his letter to the appellant, abandoning the appeal, wrote with such finality that it gave the appellant no opportunity to request him to continue with the appeal. Further, counsel did not leave the appeal in such status that the appellant being confined in prison and being unlearned in law could be expected to pick it up pro se and prosecute it to the conclusion. Neither did he have an opportunity to have the trial judge appoint new counsel to assist him in the prosecution of his appeal. The appellant was entitled not only to an appeal as a matter of right but he was entitled to have the assistance of counsel in proceeding that appeal. Id., at 883; (emphasis added).

In directing the issuance of a conditional writ of habeas corpus, the Court concluded "that the appellant did not have adequate and effective assistance of counsel in prosecuting his appeal." Id., at 883.

In an effort to avoid extensive repetitive argument, respondent lists below other federal decisions which concluded that the error of appellate counsel (whether court-appointed or retained) cannot serve to deny a defendant access to the appellate process:

D.C. CIRCUIT

Hines v. United States, 237 A.2d 827 (D.C. Cir. 1968) (counsel files late notice of appeal).

FIRST CIRCUIT

Leventhal v. Gavin, 396 F.2d 441 (1st Cir. 1968) (counsel fails to preserve appeal).

SECOND CIRCUIT

United States ex rel Maselli v. Reincke, 383 F.2d 129 (2nd Cir. 1967) (counsel fails to appeal); United States ex rel Smith v. McMann, 417 F.2d 648 (2nd Cir. 1969) (attorney fails to inform indigent of appellate rights).

FOURTH CIRCUIT

Williams v. Coiner, 392 F.2d 210 (4th Cir. 1968) (counsel fails to file Notice of Appeal); Nelson v. Peyton, 415 F.2d 1154 (4th Cir. 1969) (attorney fails to advise client of right to appeal); Turner v. North Carolina, 412 F.2d 486 (4th Cir. 1969) (attorney fails to preserve appeal).

FIFTH CIRCUIT

Horsley v. Simpson, 400 F.2d 708 (5th Cir. 1968) (attorney fails to file Notice of Appeal); Atilius v. United States, 406 F.2d 694 (5th Cir. 1969) (counsel fails to file Notice of Appeal); Rought v. Henderson, 445 F.2d 622 (5th Cir. 1971) (attorney fails to preserve appeal); Lumpkin v. Smith, 439 F.2d 1084 (5th Cir. 1971) (counsel fails to advise client as to right of appeal); Hall v. Wainwright, 441 F.2d 391 (5th Cir. 1971). (notice of appeal filed late); Mosley v. Smith, 470 F.2d 1320 (5th Cir. 1973) (attorney fails to file Notice of Appeal, withdraws as counsel of record); Flanagan v. Henderson, 496 F.2d 1274 (5th Cir. 1974) (counsel fails to obtain entire record on appeal); Pressley v. Wainwright, 540 F.2d 818 (5th Cir. 1976) (counsel withdraws after appeal begun, public defender doesn't substitute in time); Cantrell v. Alabama, 546 F.2d 652 (5th Cir. 1977) (attorney fails to file proper record on appeal); Passmore v. Estelle, 594 F.2d 115 (5th Cir. 1979) (one sentence brief).

SIXTH CIRCUIT

Goodwin v. Cantrell, 432 F.2d 521 (6th Cir. 1970) (failure to advise client of right to appeal); Henderson v. Cardwell, 426 F.2d 150 (6th Cir. 1970) (counsel fails to advise client of appellate rights); Yates v. Wingo, 425 F.2d 1167 (6th Cir. 1970) (attorney fails to file Notice of Appeal); Woodall v. Neil, 444 F.2d 92 (6th Cir. 1971) (attorney abandons appeal); Rosinski v. United States, 459 F.2d 59 (6th Cir. 1972) (attorney fails to perfect appeal)); Davis v. United States, 464 F.2d 1009 (6th Cir. 1972) (attorney withdraws after sentencing); Boyd v. Cowan, 494 F.2d 338 (6th Cir. 1974) and Boyd v. Cowan, 519 F.2d 182 (6th Cir. 1975) (failure to preserve appeal).

EIGHTH CIRCUIT

Williams v. United States, 402 F.2d 548 (8th Cir. 1968) (attorney fails to file Notice of Appeal); Blanchard v. Brewer, 429 F.2d 89 (8th Cir. 1970) (counsel fails to serve Notice of Appeal).

NINTH CIRCUIT

Gairson v. Cupp, 415 F.2d 352 (9th Cir. 1969) (failure to file Notice of Appeal); Riser v. Craven, 501 F.2d 381 (9th Cir. 1974) (counsel fails to file Notice of Appeal); High v. Rhay, 519 F.2d 109 (9th Cir. 1975), (four page brief).

TENTH CIRCUIT

Wynn v. Page, 369 F.2d 930 (10th Cir. 1966) (client not informed of appellate rights).

c - state courts

In addition to the federal courts, state courts apparently without exception, support respondent's position. In Shipman v. Gladden, Ore., 453 P.2d 921 (1969), the appellant's counsel failed to file a timely notice of appeal. As a result, Mr. Shipman lost his right to appeal to the Oregon Supreme Court. However, the Court, in banc, affirmed the granting of his motion for a belated appeal, stating:

> We hold that because of the culpable negligence of his counsel petitioner was deprived of his Fourteenth Amendment right to due process. Since the state's criminal process would be found lacking in fundamental fairness if it permitted the deprivation of appellate review by the culpable neglect of counsel, the state must provide a remedy adequate to restore the impaired right. Id., at 927; (emphasis added).

In McAuliffe v. Rutledge, 231 Ga. 745, 204 S.E.2d 141 (1974), the Supreme Court of Georgia examined a situation where an appeal was dismissed due to the failure of counsel to obtain a timely extension of time for filing the transcript on appeal. In holding that this inaction constituted ineffective assistance of counsel, the court stated:

> An attorney who through negligence, ignorance, or misinterpretation of the law as contended here, fails to perform routine duties resulting in a dismissal of his client's appeal, thereby denying such client's a right of review after conviction cannot be said to be rendering effective assistance. The result is the same as no assistance at all. Whether counsel was retained, as here, or appointed by the court, is immaterial. Id., 204 S.E.2d at 142.

The Court of Appeals of Maryland in Wilson v. State, Md., 399 A.2d 256 (1979), reached a similar result when analyzing the exact issue presented in the case at bar:

> Entitlement to assistance of counsel would be hollow indeed unless the assistance were required to be effective. It follows that a criminal defendant has the right to the effective assistance of counsel on the direct appeal of the judgment entered upon his conviction of a serious crime. Id., at 260; (emphasis added).

Interestingly, enough the Kentucky Court of Appeals has seemingly recognized that a defendant has the right to effective assistance of counsel on appeal. See: Blankenship v. Commonwealth, Ky.App., 554 S.W.2d 898 (1977); Lomax v. Commonwealth, Ky.App., 581 S.W.2d 27 (1979).

Other jurisdictions which have recognized that a defendant cannot be denied his right to appeal due to error by his appellate counsel include:

CALIFORNIA

In Re Smith, 87 Cal.Rptr. 687, 471 P.2d 8 (1970) (brief consisting of one page of legal argument).

DELAWARE

Erb v. State, Dela., 332 A.2d 137 (1974) (counsel fails to prepare transcript and record).

HAWAII

State v. Erwin, Ha., 554 P.2d 236 (1976) (counsel files a late Notice of Appeal).

ILLINOIS

People v. Brown, 39 Ill.2d 307, 235 N.E.2d 562 (1968) (attorney fails to file brief); People v. Jacobs, 61 Ill.2d 590, 338 N.E.2d 161 (1975) (attorney obtains two extensions of time to file record on appeal, but never files either record or brief); People v. Aliwoli, 60 Ill.2d 579, 328 N.E.2d 555 (1975) (counsel obtains three extensions of time to file brief on appeal, but never files brief).

MISSOURI

State v. Scott, Mo., 492 S.W.2d 168 (1973) (counsel failed to file Notice of Appeal); Ray v. State, Mo., 523 S.W.2d 478 (1975) (attorney gives client incorrect information about implications of successful appeal).

TENNESSEE

Moultrie v. State, Tenn., 542 S.W.2d 835 (1976) (counsel fails to file petition for certiorari to Tennessee Supreme Court).

TEXAS

Steel v. State, Tex., 453 S.W.2d 486 (1970) (attorney fails to file brief); Garza v. State, Tex., 433 S.W.2d 428 (1968) (failure to file brief); Jackson v. State, Tex., 447 S.W.2d 922 (1969) (no appellate briefs filed); Ex Parte Hill, Tex., 528 S.W. 2d 259 (1975) (failure to file brief); Ex Parte Raley, Tex., 528 S.W.2d 257 (1975) (retained counsel failed to file appellate brief); Guillory v. State, Tex., 557 S.W.2d 118 (1977) (no transcript nor brief filed in appellate court); Hogan v. State, Tex., 572 S.W.2d 526 (1978) (no transcript of evidence nor brief filed with appellate court).

WEST VIRGINIA

State ex rel Bratcher v. Cooke, W.Va., 188 S.E.2d 769 (1972) (attorney fails to file timely written Notice of Appeal); Carter v. Bordenkircher, W.Va., 226 S.E.2d 711 (1976) (counsel fails to preserve appeal).

For the reasons stated, the respondent submits that the alternative finding of the Sixth Circuit that he was denied his constitutional right to the effective assistance of appellate counsel was based upon substantial legal precedent. Since the petitioner has failed to demonstrate that the opinion in the case at bar is in conflict with decisions of either this Court or the other federal circuits, the respondent respectfully requests this Court to deny this petition for writ of certiorari.

II.

CONTRARY TO THE ARGUMENT OF THE PETITIONER, THE DECISION OF THE SIXTH CIRCUIT IN THE RESPONDENT'S CASE DOES NOT UNDERMINE THE RULES OF APPELLATE PROCEDURE ESTABLISHED BY THE SUPREME COURT OF KENTUCKY.

In his petition before this Court, the petitioner has contended that the Sixth Circuit's opinion in the case sub judice is of national importance inasmuch as it undermines the rules of appellate procedure of Kentucky and all other states:

> The question presented here is of plenary national importance, because it implicates state appellate procedures in the entire United States. That is, if Kentucky courts cannot dismiss appeals under state Constitutional authority, based upon acts or omissions of appellate counsel who thereby automatically and per se render Constitutionally ineffective assistance, then neither can the courts of any other state. Petition, at pp. 22-23.

However, the respondent submits that the decision in his case does not alter the power of the Kentucky Supreme Court to enforce its valid procedural rules. In the present case, the Supreme Court of Kentucky's sanction was misplaced. The net effect of the actions of the Supreme Court of Kentucky was to deny the respondent his right under the Kentucky Constitution to appeal his conviction as punishment for his counsel's actions. Certainly this constitutes a denial of fundamental fairness.

If the Kentucky Supreme Court was of the opinion that respondent's counsel engaged in unprofessional and dilatory tactics, sanctions against undersigned counsel would have been proper. United States v. Hayes, 378 F.2d 567, 568 (4th Cir. 1967); United States v. Smith, 436 F.2d 1130 (9th Cir. 1970). See Barry v. State, Fla.App., 324 So.2d 95 (1975). However, regardless of respondent's counsel's performance of his duties (or lack thereof), "[t]he consequences of his lawyer's failure should not be visited upon [the petitioner] in the form of his loss of his right to appeal. . ." United States v. Hayes, supra, at 568.

The Fifth Circuit in Flanagan v. Henderson, 496 F.2d 1274 (5th Cir. 1974), recognized that any sanction for failure to comply with procedural rules must be applied against the negligent attorney and not the criminal defendant:

> When a court discovers that an attorney has been derelict in the performance of a court duty which could forfeit a legal right accorded to a defendant in a criminal case is significant as the right to an appeal on the merits, disciplinary measures against the attorney-rather than deprivation of the defendant's rights-may be the only constitutional remedy. Id., at 1278.

The Court of Criminal Appeals of Texas in Guillory v. State, Tex., 557 S.W.2d 118 (1977), addressed this same

issue and specified those measures which could be utilized to guarantee that the appellant's rights would be protected:

> As has been stated above, the trial court also has the duty to provide an indigent defendant with the effective assistance of counsel on appeal. This assistance, however, cannot be afforded without requiring that counsel file a brief in an appellate's behalf. The trial judge has the authority to require appointed counsel to file a brief in appellant's behalf. Luna v. State, 527 S.W.2d 548 (Tex.Cr.App. 1975). If a court-appointed attorney fails to file a brief within the time provided by Art. 40.09(9) and fails to request an extension of time from this Court under Art. 40.09(16), the trial court still has the authority to require appointed counsel to file a brief in an appellant's behalf. There are many ways for the trial court to exercise this authotity. Upon learning that no brief has been filed in appellant's behalf under Art. 40.09(9), the trial court can issue an order commanding court-appointed counsel to file a brief within a specified period of time. If no brief is filed within that time, the trial court can issue another order requiring counsel to show cause as to why he should not be held in contempt. See Art. 191la, supra. The trial court can also report counsel to the appropriate grievance committee for disciplianry action. In the alternative, the trial judge can relieve an appointed attorney who has not fulfilled his duties to his client and appoint an attorney who will act as an advocate to represent the indigent on appeal. The trial judge can also see to it that recalcitrant attorneys receive no further appointments to represent indigents in his court. Id., at 121.

It was the respondent's contention before the Supreme Court of Kentucky that the requested extension of time to file his appellate brief was primarily mandated by the workload of the Public Defender Office. The Supreme Court of Indiana has demonstrated an admirable sensitivity to the latter rationale. In Thomas v. State, Ind., 242 N.E.2d 919 (1969), the Court stated:

> We wish to make it clear that we do not hold or intend to imply that the public defender was incompetent or acted in an improper manner. Confronted with twice the normal case load, he may well have done all that he possibly had time to do for the appellant. If he did so, he properly performed the duties of his office. On the other hand, the appellant's rights can not be determined by the case load of the public defender. It

> is reversible error not to provide a defendant in a criminal prosecution with adequate legal representation at each stage of the proceeding, regardless of the circumstances which cause the public defender's office to become overloaded. If the public defender was too busy to adequately represent each of his clients, the court should have appointed other counsel to assist him in carrying out his responsibilities. Id. at 925; (emphasis added).

Contrary to the assertion of the petitioner, the Sixth Circuit has indicated a sensitivity to the right of the Kentucky Supreme Court to enforce its procedural rules. In the respondent's case, the Court noted:

> We recognize Kentucky's right to decide, in the first instance, any disputed issue of fact concerning representations of work overload by counsel supplied by the State. If inaccurate claims are tendered, Kentucky can take measures to discipline any lawyer found to be untruthful in such representations, or willfully or negligently delinquent. Cleaver, supra, at 1012.

The petitioner has also argued before this Court that the decision in the respondent's case has imposed a limitation on the state courts which the federal courts do not impose on themselves. Petition, at pp. 9, 12. Nothing could be further from the truth.

Very recently, the Sixth Circuit decided the case of Carter v. City of Memphis, ____F.2d ____, No. 79-1056 (opinion rendered December 29, 1980), Sixth Circuit Review, Vol. 10, No. 3 at p. 4. In the cited case, the federal district court had dismissed a civil rights action because of the plaintiff's attorney's failure to comply with a pretrial order. Id. Even though it recognized the power to dismiss under FRCP 41(b), the Sixth Circuit held that the dismissal was an abuse of discretion inasmuch as the fault lay with the plaintiff's attorney, not the plaintiff:

> The dismissal of an action for an attorney's failure to comply is a harsh sanction which the court should order only in extreme situations showing "a clear record of delay or contumacious conduct by the plaintiff." . . .Absent this showing, an order of dismissal is an abuse of discretion; the court is

> limited to lesser sanctions designed to achieve compliance. . . .The sanction of dismissal is appropriate only if the attorney's dilatory actions amounted to failure to prosecute and no alternative sanction would protect the integrity of pre-trial procedures. . . .Dismissal is usually inappropriate where the neglect is solely the fault of the attorney. Id.

In the final analysis, the petitioner asks this Court to sanction a rule of law whereby an indigent defendant can be denied his right to a direct appeal through no fault of his own and be left without any remedy or recourse. There is a reason why the petitioner is unable to cite to any case law in support of his position - there is none.

The opinion of the Sixth Circuit in the respondent's case reflects proper deference to the right of the Kentucky Supreme Court to enforce its rules of appellate procedure. However, under the facts of the respondent's case, the sanction applied was inappropriate,. For these reasons, the petition for a writ of certiorari should be denied.

III.

IN ANY EVENT, THERE IS AN INDEPENDENT BASIS FOR THE DECISION OF THE SIXTH CIRCUIT IN THE RESPONDENT'S CASE WHICH HAS NOT BEEN PRESENTED TO THIS COURT BY THE PETITION FOR A WRIT OF CERTIORARI.

As previously discussed, the opinion of the Sixth Circuit in the case at bar was premised upon two alternative theories: (1) That the respondent was denied his right to equal protection of law inasmuch as his direct appeal was dismissed solely on the basis of his indigency.[1] Cleaver v. Bordenkircher, 634 F.2d 1010, 1012 (6th Cir. 1980); and (2) That

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[1] In his pleadings before this Court, the petitioner has complained that the equal protection analysis in Cleaver was never presented by the respondent to the federal district court. Petition, at pp. 17-19. Initially, it should be recalled that it was the petitioner who initially raised the equal protection question before the Sixth Circuit. Brief for Respondent-Appellant at pp. 14, 17-18, 20, 48, and 50. See: Counterstatement of Facts, infra, at p. 8 . More importantly, however, the petitioner never raised this issue before the Sixth Circuit once the opinion in Cleaver was issued. There was no petition for rehearing filed before the Sixth Circuit. If the petitioner felt that the Sixth Circuit erroneously decided the Cleaver case on equal protection grounds, then that

the respondent was denied his right to due process of law inasmuch as his appointed appellate counsel rendered ineffective assistance of counsel.

In the petition pending before this Court, the Question Presented For Review is as follows:

> Is There a Constitutional Right to the Effective Assistance of Appellate Counsel, as Opposed to Trial Counsel?

Consequently, assuming arguendo that this Court should grant the petition for a writ of certiorari, and assuming further that this Court should reverse the holding of the Sixth Circuit in Cleaver in regard to effective assistance of appellate counsel, there would still exist an independent basis for the Sixth Circuit opinion - the equal protection analysis. The hypothetical success of the petitioner's actions before this Court would not affect the issuance of a writ of habeas corpus.

In an analogous situation, this Court in The Monreso v. Carbon Black Export, Inc., 359 U.S. 180, 184, 79 S.Ct. 710, 3 L.Ed.2d 223 (1959), stated:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the. . .[issue in conflict] can await a day when the issue is posed less abstractly.

Since the petitioner is in essence requesting an advisory opinion from this Court, this petition for a writ of certiorari must be denied.

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[1](continued) issue should have been addressed to the Sixth Circuit - not raised for the first time in the petition pending before this Court. As a general rule, this Court will not consider contentions not presented to the court below. See, e.g., Dorszynski v. United States, 418 U.S. 424, 431 n.7 (1974); Jenkins v. Anderson, ___U.S. ___, 100 S.Ct. 2124, 2127 n.1 (1980); Anderson v. Charles, ___U.S. ___, 100 S.Ct. 2180, 2181 n.1 (1980); Sandstrom v. Montana, 442 U.S. 510 (1979).

CONCLUSION

For the reasons stated above, the respondent respectfully requests this Court to deny the Petition for a Writ of Certiorari filed in the above-captioned case.

Respectfully submitted,

WILLIAM M. RADIGAN
ASSISTANT PUBLIC DEFENDER
THIRD FLOOR
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC ADVOCATE
THIRD FLOOR
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

CO-COUNSEL FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

Misc. No. 80-1278

DEWEY SOWDERS, WARDEN
KENTUCKY STATE PENITENTIARY

Petitioner,

v.

GEORGE H. CLEAVER,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, George H. Cleaver, who is now held in the Kentucky State Penitentiary, asks leave to file the attached Brief for Respondent in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 in the above-captioned action. The respondent has been permitted to proceed in forma pauperis in all proceedings in the court below.

The respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

WILLIAM M. RADIGAN
ASSISTANT PUBLIC DEFENDER
OFFICE FOR PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601
CO-COUNSEL FOR RESPONSENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-1278

DEWEY SOWDERS, WARDEN, Petitioner

v.

GEORGE H. CLEAVER, Respondent

CERTIFICATE OF SERVICE

I, William M. Radigan, co-counsel for respondent, hereby certify that the attached Brief for Respondent in Opposition, Motion for Leave to Proceed in Forma Pauperis, and Affidavit of Indigency were served on petitioner by mailing, U.S. postage prepaid, copies of the aforementioned documents, on February 26th, 1981, to respondent's counsel, J. Gerald Henry, Assistant Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601.

William M. Radigan

WILLIAM M. RADIGAN
ASSISTANT PUBLIC DEFENDER
MEMBER, BAR OF THE SUPREME
COURT OF THE UNITED STATES